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IN THE

# Supreme Court of the United States

October Term, 1974

No. 74-165
No. 74-167
No. 74-168

UNITED STATES OF AMERICA, *et al.*,
*Appellants,*

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

## BRIEF OF APPELLEES, CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

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v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

## BRIEF OF APPELLEES, CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

This brief is filed on behalf of Appellees who are owners of mortgage bonds of Penn Central Transportation Company ("Penn Central") and of certain lessors of leased lines of Penn Central ("Lessors") secured by mortgages on rail properties of Penn Central and Lessors, and certain banks which are corporate trustees or successor corporate trustees under indentures, mortgages or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured.[1]

[1] The identity of Appellees and their interests in Penn Central and Lessors is described at pages 204-05 and 210 of the Joint Appendix which the parties have lodged with the Court. Reference to the pages of that Appendix will be prefaced by "JA". The parties have also lodged with the Court a Joint Documentary Submission

*(Footnote continued)*

## Opinions Below

The opinions in the District Court, and its order entered on June 25, 1974, are not yet reported. They are set out in full in the Joint Appendix at JA 9-83.

## Jurisdiction

This case was brought pursuant to 28 U.S.C. §§ 1331(a), 1337, 2201 and 2202, seeking a declaratory judgment that the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985-1023, 45 U.S.C. §§ 701-93 (the "Rail Act" or "Act"), is void for repugnance to the Constitution of the United States and an injunction against the enforcement, operation and execution of the Act insofar as it was found to be unconstitutional. Two other actions, *Smith* v. *United States* and *Penn Central Co.* v. *Brinegar*, originally brought in the District of Columbia on substantially the same grounds, were transferred to the Eastern District of Pennsylvania. The three actions were consolidated for disposition before a three-judge Court convened pursuant to 28 U.S.C. §§ 2282 and 2284.

These appeals have been taken from the order of that Court granting partial summary judgment to the plaintiffs, declaring certain portions of the Act to be unconstitutional and granting certain injunctive relief. The jurisdiction of this Court has been invoked by Appellants pursuant to 28 U.S.C. §§ 1252 and 1253.

Pursuant to stipulation of all counsel, briefs on the merits are being filed in advance of the determination of this Court as to probable jurisdiction, in order to facilitate an expedited hearing schedule as sought by all parties in a joint motion previously filed with the Court.

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*(Continued footnote)*
containing other materials which formed a portion of the record before the Court below, pursuant to stipulation. References to the items in the Joint Documentary Submission will be prefaced by "J. Doc. No." followed by the item number and, where appropriate, a further internal reference as to the subject matter of the citation.



## Constitutional and Statutory Provisions Involved

Article I, Section 8, Clauses 3 and 4, of the United States Constitution, in pertinent part provide:

> "The Congress shall have power . . .
>
> • • • •
>
> To regulate Commerce with foreign Nations and among the several States . . .;
>
> To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States; . . ."

Article I, Section 9, Clause 7, provides:

> "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Rail Act, Pub. L. No. 93-236, 87 Stat. 985, 45 U.S.C. §§ 701-93, is set forth in full at JA 391-431.

The Tucker Act, as amended, 28 U.S.C. § 1491, provides in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

## Questions Presented

1. Was the Court below correct in concluding that the Rail Act required the Penn Central estate to continue rail operations at massive and irreversible losses, without assurance of adequate compensation, and that the Act in this respect was repugnant to the Fifth Amendment to the United States Constitution?

2. Did the Court below correctly hold that no recourse pursuant to the Tucker Act exists so as to afford Appellees an adequate remedy at law for the constitutional deficiencies resulting from the operation of the Rail Act?

3. Did the Court below abuse its discretion in issuing the injunctions contained in its order, or in shaping their respective terms?

4. Can the result reached by the Court below be sustained on alternative grounds in that:

(a) the Act effects an uncompensated taking of Appellees' property;

(b) the Act constitutes a law on the subject of bankruptcies which is void because, by its terms, it is not uniform throughout the United States; or

(c) the procedures mandated by the Act deprive Appellees of their property without due process of law?

## Statement of the Case

### I. Nature of Case and Proceedings Below

During 1974 the financial crisis long impending among the railroads of the Northeast and Midwest moved swiftly to a legal climax. In response to the apparent inability of the seven bankrupt Class I railroads in the region, most particularly Penn Central, to achieve reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. §205 ("Section 77"), Congress passed and the President signed the Rail Act, effective on January 2, 1974.



The Act immediately encountered broad-based challenges, posed by the Penn Central Trustees (the "Trustees") and all classes of its security holders, in proceedings both under and outside the Act.

Proceeding under Section 207(b) of the Act, although reserving the rights of all parties to object to its terms, the Penn Central Reorganization Court held, on May 2, 1974, that Penn Central was not capable of being reorganized on an income basis within a reasonable time (hereinafter referred to as the "120-Day Decision").[2]

Also proceeding under the terms of the Act, with a similar reservation, the same Court, on July 2, 1974 found that the Act does not provide a process which would be fair and equitable to the Penn Central estate (hereinafter referred to as the "180-Day Decision").[3]

Meanwhile, the actions from which these appeals have been generated were commenced by secured creditors, indenture trustees, unsecured creditors and the sole stockholder of Penn Central. Consolidated for disposition, the matter came on before the three-judge Court upon motions and cross-motions for summary judgment. The three-judge Court had before it, in addition to the papers originally filed in the respective plenary actions, a stipulation of

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[2] Reorganization Court Memorandum and Order No. 1543, May 2, 1974 (JA 84 *et seq.*).

[3] Memorandum in Support of Findings and Order No. 1596 Pursuant to the Second Sentence of § 207(b) of the Regional Rail Reorganization Act of 1973, July 2, 1974 (JA 124 *et seq.*). An appeal from that determination has been taken to the Special Court established pursuant to the Act and is, as of the date of this brief, *sub judice*. The Act requires the Special Court to decide appeals within 80 days after they were noticed so that the Special Court must decide the appeal after this brief is submitted but before this Court reconvenes. Appellees will, if appropriate, file a supplemental memorandum relating to the decision of the Special Court.

facts (JA 203-09) and, by agreement of the parties (JA 197-99), specified portions of the record previously developed in the Penn Central reorganization proceedings.

The Court below granted plaintiffs' motions in part, denied the cross-motions of the defendants and the intervening defendants, filed its opinions and entered its order on June 25, 1974. In specified respects, the order declared the Act unconstitutional and enjoined its effectuation.

### II. The Penn Central Reorganization: Backdrop for the Rail Act

This litigation arises in the context of complex and deeply-rooted problems in the transportation system of the Northeast and Midwest regions of the United States. The Penn Central system, embracing approximately 19,850 route miles of the rail trackage in that region (JA 212-13), is at the center of the crisis. Reasons for the declining prospects of rail transportation in the region abound, but most certainly they include competition from millions of automobiles and multiple schedules of competitive jet air service which have blighted the prospects for railroad passenger transportation while the traditional railroad freight business has been lost progressively to inland waterway operations, pipelines and trucks. The crisis has been aggravated by an accumulation of Government policies tending "to favor non-rail transportation and perpetuate a regulatory climate that [was] hostile to experimentation".[4] While the railroads labor under ever increasing burdens of maintenance and equipment expense, competing transportation systems relying on water, air and highway have been the beneficiaries of heavy public investment

[4] *In re Central R.R. of N.J.*, 485 F. 2d 208, 217 (3d Cir. 1973) (Aldisert, J., dissenting), *cert. denied*, 414 U.S. 1131. For a discussion of these subjects in more detail, see Staff Report, "The Penn Central and Other Railroads," Senate Committee on Commerce, December 1972 at 220 *et seq.*



which have substantially aided their operations at little or no user cost.

On June 21, 1970, Penn Central petitioned for reorganization under Section 77 and shortly thereafter Trustees duly appointed and confirmed began to oversee its reorganization.

Penn Central had been in severe financial straits for several years. During the years ended December 31, 1968 and 1969, it had sustained ordinary income losses of $41,914,598 and $91,631,726, respectively.[5] After the Trustees took over, the massive losses continued to mount: ordinary income losses of $179,700,000 were sustained during the period from June 21, 1970 to December 31, 1970.[6]

The Trustees quickly determined that the prospects for improvement in Penn Central's operations, absent changes over which neither they nor the Reorganization Court had any control, were minimal, and they so reported to the Court. Prelim. Rep. Concerning Premises for Reorganization, Feb. 10, 1971 (J. Doc. No. 1). They specified there that there could be no hope of profitable operation without massive increases in freight shipments and revenues and without fundamental changes in four respects, which came to be known as the "conditions to viability": (1) elimination of passenger service losses; (2) plant rationalization (primarily through abandonment of excess or uneconomic lines); (3) more flexible rate and division procedures; and (4) elimination of excess labor costs. The Trustees con-

[5] Penn Central Annual Report on Form A to the Interstate Commerce Commission ("ICC") for the year ended December 31, 1969 (includes operations of The New York, New Haven and Hartford Railroad Company from date of acquisition, December 31, 1968).

[6] Finding of Fact No. 4, 120-Day Decision (JA 84, 89-90). Subsequent citations to such Findings are cited as "FF — ". See also Affidavit of Ernest R. Varalli, March 21, 1974 (J. Doc. No. 19) (hereinafter "Varalli affid."), Ex. T-1.

cluded their very first report by emphasizing what is still the heart of the matter:

> "But the overriding problem of Penn Central remains—the problem that must be overcome if it is to stay in the private enterprise system. It is found in an obligation to perform as a public service company in certain areas and under certain conditions which simply do not lend themselves to profitable operations, no matter who the operator is, or how efficient. The only possible remedy here is for public authority to lend its hand to a speedy elimination of the conditions which produce the losses, or respond with adequate compensation if it insists upon a continuance of the conditions." *Id.* at 15.

To date none of the four specified conditions to viability has been achieved.[7] The issues presented by this appeal relate primarily to the constitutional adequacy of the Rail Act which, as events unfolded, emerged as the response of the "public authority".

The financial crisis continued to deepen. In order to avert an immediate and severe cash shortage, the Trustees issued $100 million in Trustees' Certificates, for which a federal guaranty was required.[8] In return for the guaranty, the Government received a lien ahead of existing creditors on substantially all of Penn Central's properties.[9]

[7] 120-Day Decision (JA 88). See also 180-Day Decision (JA 126-28).

[8] Emergency Rail Services Act of 1970, 45 U.S.C. §§ 661 *et seq.*

[9] See Order No. 124 (Doc. No. 704). (References to "Doc. No. —" are to documents of record in the Penn Central reorganization proceedings.) $50 million principal amount of the Trustees' Certificates matures in January 1976 and presumably must be refunded at that time. See Affidavit of John S. Guest, March 25, 1974 (J. Doc. No. 20) (hereinafter "Guest affid.") at 9. It presently appears unlikely that the Trustees will be able to obtain the necessary financing from private sources.



In addition to the infusion of funds from a new paramount lien of that magnitude, the Trustees were required to, and did: (1) apply to rail operations an aggregate of $155 million from non-recurring cash items (Stip. No. 11(a), (b),[10] JA 206-07; FF 4, JA 89-90; Varalli affid., Ex. T-1, J. Doc. No. 19); (2) utilize approximately $157 million of non-rail income for rail operations (Stip. No. 11(c), JA 207);[11] and (3) defer payments of real estate taxes ($241 million), leased line rentals ($101 million) and interest on mortgage and collateral trust debt ($104 million) as well as interest on unsecured debt sufficient to bring the total of all such deferrals to $605 million (Stip. Nos. 12, 13, 14, JA 207-08; FF 4, JA 89-90; Varalli affid., Ex. T-1, J. Doc. No. 19). In addition, the Trustees deferred some $665 million of expenditures for maintenance of way. (Affidavit of Clarence E. Jackman, March 25, 1974 (J. Doc. No. 18) (hereinafter "Jackman affid."); FF 10, JA 91-92.)

Notwithstanding the massive proportions of these measures, taken separately or cumulatively, the Trustees were barely able to continue operations and were wholly unable to stem the tide of gigantic operating losses. Moreover, little progress was made in achieving any of the conditions to viability, and the Trustees' periodic reports on reorganization matters grew more pessimistic. As they reported on February 15, 1972:

> "If these three changes [plant rationalization, personnel reduction, passenger service compensa-

[10] The parties below have agreed that certain facts set out in a stipulation dated April 15, 1974 entered in the record below are deemed to be true. References to "Stip. No. —" are to items of that stipulation (JA 203-11).

[11] Certain other efforts of the Trustees to obtain cash from non-recurring or non-rail sources were unsuccessful. See, *e.g.*, *In re Penn Central Transp. Co.*, 484 F.2d 323 (3d Cir. 1973), holding that the sale of major income-producing real estate properties was inappropriate except as part of a plan of reorganization.

> tion] were not to be made—or if there were undue delay in making them—there would not be, in the judgment of the Trustees, the basis for reorganizing the Penn Central as a private enterprise. This conclusion is based on studies and analyses which show that *maximally effective self-help measures alone*—taken with the most reliable available estimates of traffic increases in the future—would result in continued losses during the next four years and would show only marginal earnings by 1976. *That would be too little and too late—for there would have been unconscionable and possibly unconstitutional erosion of the Debtor's estate in the meantime.* This judgment could only be invalidated by an unlikely confluence of favorable developments including a spectacular and sustained increase in revenues far beyond what is here forecast." J. Doc. No. 4 at 2. (Latter emphasis added.)

The emphasized passage of the report struck for the first time what was to be the keynote of the reorganization—and of this litigation—namely the "unconscionable and unconstitutional" results of continuing the railroad's operations in the face of intractable losses and erosion.

The Trustees' attempt to effectuate a traditional income-based reorganization of Penn Central through their own efforts and with the voluntary cooperation of other parties, including governmental authorities, shippers and labor, proved unavailing. The Trustees recognized this, and in their January 1, 1973 Report (J. Doc. No. 8 at 1), publicly avowed that the railroad was not reorganizable in a traditional sense, announcing that they "have concluded that without government financial assistance for improvement of the railroad, a reorganization of Penn Central cannot be achieved in 1976, as they had considered possible."

The financial assistance mentioned was to be used to improve Penn Central's plant and provide more serviceable



equipment so that projected traffic increases "upon which the reorganization depends" could be achieved. The Trustees shortly thereafter told the Court that the amount needed was between $600 million and $800 million. Trustees' Report, Feb. 1, 1973 (J. Doc. No. 9) at 2. And the Trustees again drove home the point:

> "It is clear that the status quo will not permit an income-based reorganization. Indeed, because of the accumulation of losses and unpaid priority charges, a continuation of present operations would do violence to the constitutional prohibition against the using of private property for a public purpose without adequate compensation." *Id.* at 7.

The continued emphasis by the Trustees on the constitutional problems of interim loss operations is noteworthy.

Notwithstanding Penn Central's deteriorating financial condition and darkening prospects, the Trustees still attempted to use whatever self-help measures they could in striving to effectuate the conditions to viability.

Piecemeal abandonments furnished no real response to the problems of Penn Central. Any significant doubt on that score was dispelled by studies of the potential viability of a hypothetical "core" Penn Central system developed by Wyer, Dick & Co. ("Wyer, Dick") for the Trustees.[12] These studies established that even if the most optimistic

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[12] The studies were introduced into evidence by the Trustees in the proceedings before the ICC on the plans of reorganization of Penn Central discussed below. Exhibits introduced in those proceedings are hereinafter cited as "ICC Ex. —." Statement of Charles C. Shannon, ICC Ex. 19. That record (in Fin. Dkt. No. 26241) was before the Court below in full (JA 199). Portions of that record have been reproduced in the Joint Documentary Submission lodged with this Court.

predicted conditions[13] were achieved instantly, including the instant abandonment of 6,000 route miles (30%) of trackage and the physical elimination of passenger operations (as distinct from passenger losses), the remaining 15,000 mile core of the Penn Central system could not generate income available for fixed charges until 1976.

Nevertheless, in order to mitigate the drain on the estate, the Trustees filed applications with the ICC to abandon 3,742 miles of track. As of July 1973, when the ICC ceased processing any abandonment applications because of the decision in *Harlem Valley Transp. Ass'n* v. *Stafford*, 360 F.Supp. 1057 (S.D.N.Y. 1973), *aff'd*, No. 73-2496 (2d Cir., June 18, 1974),[14] only some 1,400 miles of track had been authorized for abandonment.[15] Since January 2, 1974 the Trustees have requested authorization from the United States Railway Association ("USRA") to abandon approximately 1,528 miles of track under Section 304(b) of the Act (J. Doc. No. 65). USRA

[13] The Wyer, Dick studies were based upon projections of the revenues potentially available to Penn Central for the five-year period of 1974-1978, made in May 1973 by Temple, Barker & Sloane ("TBS"), consultants to the Trustees. The projections were criticized as overly optimistic by Mr. Shannon, President of Wyer, Dick (ICC Ex. 19 at 9-14). The May 1973 projections were, in fact, the third such forecast made by TBS at the Trustees' request, and in each successive forecast the total freight tonnage forecast was revised downward. Statement of Carl S. Sloane, ICC Ex. 17 (J. Doc. No. 38) at 10. Mr. Sloane also acknowledged that "external factors" and "present circumstances" rendered the May 1973 forecasts optimistically unreliable. *Id.* at 20. And Mr. Shannon concluded that the viability study did not "form the basis for a responsible and feasible plan of reorganization" because the conditions on which it was predicated were "unlikely of achievement." ICC Ex. 19 at 25.

[14] There the court held that before any hearing on abandonment applications could be held, an environmental impact statement must be issued.

[15] Preliminary Report of ICC in Fin. Dkt. No. 26241 (J. Doc. No. 54 at 13) (hereinafter "ICC Report").



responded that no procedures for handling such requests had yet been determined (J. Doc. No. 66). All such applications thus landed in administrative limbo.

The Trustees' efforts to eliminate excess labor costs met no better success. The Trustees placed great stress on the multi-million dollar savings to be obtained through reduction in the number of persons constituting a train crew. This objective was, and remains, unacceptable to organized labor. In early 1973, after full compliance with the procedures of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, the Trustees unilaterally posted new work rules designed to reduce crew sizes solely by means of attrition. A strike ensued which was quickly ended on February 9, 1973, not by negotiations between the parties, but by the passage of United States Senate Joint Resolution 59-2, nullifying the work rule changes and requiring the continuation of the status quo. The Trustees have not subsequently attempted self-help measures to resolve their major labor problems.

In the face of the still deepening crisis, and fully aware of the Trustees' futile efforts to achieve the conditions of viability by self-help, the Reorganization Court on March 6, 1973, on its own motion, entered Memorandum and Order No. 1137 (J. Doc. No. 28) directing the Trustees to file, not later than July 1, 1973, either a plan of reorganization of Penn Central or their proposals for liquidation. The Court stated:

> "Whether the constitutional limit [of interim erosion] has been exceeded depends primarily upon how the remaining assets are to be valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Under any view of the matter, it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived.
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> • • •

> "The essence of § 77 of the Bankruptcy Act is that the legal remedies normally available to creditors may be held in suspension for a reasonable time in order to permit rehabilitation of the enterprise. Whenever it appears that there is no genuine likelihood of ultimate success, the legal and constitutional justification for restraining creditors from exercising their normal remedies disappears. . . . [I]t is apparent that the required profitability cannot be achieved unless substantial further progress is made in the immediate future to meet the conditions upon which the projected profitability is based. . . .
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> • • •
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> ". . . On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973." *In re Penn Central Transp. Co.*, 355 F.Supp. 1343, 1344-46 (E.D. Pa. 1973).

Again, the emphasis on constitutional problems of continued operations should be noted.

The Trustees complied with the Court's directive and filed a plan of reorganization for Penn Central which, briefly stated, contemplated the orderly liquidation of Penn Central's rail assets and its reorganization around its other assets.[16] The plan was filed with the ICC, as were other plans proposed by the New Haven Trustee and Penn Central Company, and hearings before the ICC (Fin. Dkt. No. 26241), in which all interested parties participated, continued through the summer of 1973. On October 1, 1973, the ICC issued its "Preliminary Report", holding, *inter alia*, that the Trustees' plan was not "a plan of reorganization within the meaning of section 77(b) of the Bankruptcy Act"[17] and refusing to certify it or any other plan of reorganization to the Reorganization Court for further consideration. The ICC Report also stated that further hearings would be held in the matter. None was ever scheduled or held.

Following the refusal of the ICC to certify a plan of reorganization, the New Haven Trustee, on October 9, 1973, moved before the Reorganization Court for dismissal of the Penn Central reorganization proceedings under Section 77(g) and institution of an equity receivership as contemplated by Section 77(i) (J. Doc. No. 13).[18]

The Court held a hearing in October 1973 to consider the implications of the ICC order. At that hearing, the Under Secretary of Transportation reported to the Court on the status of the legislative effort (see excerpt at J. Doc. No. 24) and largely on his representations that adequate federal assistance was imminent, the Court agreed to bide its time.[19] It is fair to conclude that the Reorganization Court would have reluctantly terminated rail operations by the end of 1973 had not the Government held out the promise that help would be forthcoming.

[16] Shortly before the Trustees' plan was filed, fifteen Lessors ("Secondary Debtors") also filed petitions for reorganization under Section 77 in conjunction with the Penn Central reorganization proceedings. The Secondary Debtors own, or themselves lease from others, 9,304 miles (or 46.9%) of the 19,850 miles of road presently operated by Penn Central (JA 105, 212-13). None of the leases with the Secondary Debtors has been affirmed or rejected (JA 105). The proposed plan of reorganization also dealt with the Secondary Debtors, since their fate is inextricably intertwined with that of Penn Central.

[17] ICC Report (J. Doc. No. 54) at 111.

[18] By petition filed in March, 1973 (J. Doc. No. 12), the New Haven Trustee had sought, *inter alia*, the fixing of a date for termination of operations. The petition was never set down for hearing.

[19] After the Act was passed, further petitions were filed by the Institutional Investors Penn Central Group and certain indenture trustees on March 7, 1974 seeking termination of rail operations (Doc. No. 7135) and by Penn Central Company on April 4, 1974 seeking termination of rail operations and severance of rail properties from non-rail properties (Doc. No. 7314). These petitions and the aforementioned motion of the New Haven Trustee have been briefed and argued to the Reorganization Court and are pending.

During 1973, the financial condition and prospects of Penn Central continued to worsen: the system lost $189 million from operations in 1973.[20] In early 1974 Penn Central had approximately $10,800,000 of installment payments due on equipment obligations which it was unable to meet and, accordingly, applied for an "emergency" grant under Section 213 of the Act (J. Doc. No. 14). However, the Secretary of Transportation refused to make an outright grant as apparently called for by the Act but insisted on acquiring a *pro tanto* interest in the Trustees' equity in the equipment involved equivalent to the amount of the payments made. Notwithstanding outright opposition to the transaction by some creditor interests and the position of most others that the transaction was contrary to the intent of the Act, the Reorganization Court approved the transaction, stating, "There is no alternative" (J. Doc. Nos. 29, 30). Later, on April 30, 1974, the Secretary authorized and the Reorganization Court approved an outright grant of an additional $18,000,000 under Section 213 to stave off yet another cash crisis (J. Doc. No. 31).

### III. The Impact of Operations During Reorganization of the Penn Central Estate

The events described above provide merely a glimpse of the massive evidence before the Court below documenting the inexorable trend in the Penn Central reorganization proceedings towards continual and irreversible losses, the continued dissipation of non-recurring and non-rail income in non-remunerative rail operations, and the continued substantial deterioration of plant and equipment.

Some specific facts point up the magnitude of this financial and physical erosion more graphically:

(1) During the period from June 21, 1970 to December 31, 1973, Penn Central's operations resulted in losses in ordinary income, calculated in accordance with ICC regulations, as follows (FF 1, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1):

[20] FF 1, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1.



| | |
|---|---|
| June 21, 1970 to December 31, 1970 .... | $179,700,000 |
| Year ended December 31, 1971 ..... | 284,500,000 |
| Year ended December 31, 1972 ..... | 197,900,000 |
| Year ended December 31, 1973 ..... | 189,000,000 |
| Total ..... | $851,100,000 |

(2) During that period, non-recurring income approximating $155,300,000 was expended to sustain operations (FF 3, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1).

(3) The amount set forth in (2) above does not include the additional amount of approximately $28,800,000 received under Section 213 of the Act (see FF 4, JA 90).

(4) During that period, $157,000,000 in non-rail income was utilized in operating Penn Central's rail properties (Stip. No. 11(c), JA 207, 211).

(5) During that period, unpaid and deferred real estate taxes, leased line rentals and interest on debt obligations aggregated approximately $605,900,000 (FF 2, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1).

(6) Deferral of maintenance of way spread from branch, side and yard trackage to mainline trackage, and deterioration of portions of the main line accelerated. That in turn resulted in, among other things, slow orders being imposed in 1974 on 8,475 track miles, up from 2,100 track miles in 1970. A total of 6,900 track miles was classified by the Federal Rail Administration as not being in adequate condition to meet the minimum standard for operational track speed of 10 miles per hour (49 C.F.R. §§ 213 *et seq.*). The deterioration of the roadway increased train time, decreased service capacity and depressed the system revenues still further (FF 7, 8, 9, 10, JA 91-92; Jackman affid., J. Doc. No. 18, at 3-4).

(7) Even assuming annual expenditures of $225 to $250 million for normalized maintenance of way, an additional $665 million (in non-inflated dollars) must be expended to catch up with past deferred maintenance. The amount of deferred maintenance is so great that it would require eight years to make up, even if all the money were presently available (FF 10, JA 91-92; see Jackman affid., J. Doc. No. 18, at 4).

It cannot be seriously disputed that if Penn Central is forced to continue operations on the present basis, additional massive financial losses and deterioration of plant will result. The Reorganization Court found reasonable—upon uncontradicted competent expert testimony[21]—projected ordinary income losses for Penn Central in the years 1974-1978 of the following magnitude:

| | |
|---|---|
| 1974 | $(237,700,000) |
| 1975 | (196,300,000) |
| 1976 | (136,000,000) |
| 1977 | (96,000,000) |
| 1978 | (56,200,000) |

(FF 12-19, JA 92-95; Affidavit of Carl S. Sloane, March 25, 1974 (J. Doc. No. 16) (hereinafter "Sloane affid.") at 7-11; Varalli affid., J. Doc. No. 19, at 4, Ex. T-2).

[21] This testimony was introduced at the 120-day hearing at which the United States was represented and had an opportunity to cross-examine and to offer rebuttal evidence. The Court indicated the probable availability of portions of the record there made in the plenary constitutional actions (J. Doc. No. 26 at 11,112). No contrary evidence was ever tendered by the United States; no appeal from the 120-Day Decision was taken by the United States; and inclusion of this evidence in the record below and in the submission to this Court was agreed to by the Government and USRA (JA 198, item 11; JA 6, item II-1). At no time, therefore, have Appellants in any form attempted to offer any countervailing evidence as to Penn Central's prospects, and the findings of the Reorganization Court as to the reasonably likely losses, accumulation of priority claims, and related matters are thus before this Court uncontradicted.



The foregoing projections are based upon assumed continued diversion to rail operations of non-rail income. The magnitude of ordinary income losses reasonably projected for the same period on a rail-operations-only basis was found to be as follows:

| | |
|---|---|
| 1974 | $(236,700,000) |
| 1975 | (206,400,000) |
| 1976 | (153,900,000) |
| 1977 | (120,300,000) |
| 1978 | (82,300,000) |

(FF 24, 25, JA 98-99; Varalli affid., J. Doc. No. 19, Ex. T-3).

Neither of these projections reflects the further costs of eliminating deferred maintenance (FF 27, JA 100). If, on the one hand, such costs—found by the Reorganization Court to be reasonably estimated at $665 million over eight years (FF 10, JA 91-92, n. 2)—were to be charged against operations, the resultant losses would be correspondingly greater. If, on the other hand, the amounts necessary to cure deferred maintenance are not expended, the physical plant of Penn Central will continue to deteriorate, with a resultant loss of traffic and accelerated decline in revenues. (FF 10, 22, JA 91-92, 97; Sloane affid., J. Doc. No. 16, at 11.)

It is also reasonable to expect that in the period 1974-1978, as much as $310,700,000 in local taxes, $137,100,000 in bond interest and $140,000,000 in leased line rentals will accrue, but not be paid. (FF 23, JA 98; Guest affid., J. Doc. No. 20, at 9-10.)

In summary, from the inception of the Penn Central reorganization proceedings, despite substantial efforts by the Trustees, a traditional income-based reorganization was never in the cards. It is, of course, now both conceded (Stip. Nos. 8, 9, JA 206) and finally found (JA 103) that such reorganization is not possible. The Trustees realized early that without substantial achievement of objectives

not within their control or that of the Reorganization Court — elimination of plant redundancy (primarily through major line abandonments), elimination of excess labor, full reimbursement for passenger service and improvement in rates and divisions—Penn Central's situation was hopeless. None of those conditions to viability came close to fruition. The inevitable result was that the financial prospects of Penn Central deteriorated calamitously.

**IV. Proceedings under the Rail Act**

By 1973, six Class I roads in the Northeast and Midwest, in addition to Penn Central, were seeking reorganization under Section 77.[22] And there was an imminent possibility that Penn Central or one or more of the other bankrupt lines might be forced to discontinue operations, whether by reason of lack of cash, physical deterioration or an order of a reorganization court to prevent unconstitutional erosion. Congress sought a solution to this crisis through most of 1973. The result is the Rail Act.

Proceeding under that Act, the Reorganization Court entered its 120-Day Decision on May 2, 1973 with respect to both Penn Central [illegible] 103) and the Secondary Debtors (JA 104-20). As to Penn Central, the Court held, in accordance with the views expressed by virtually every participant in the hearings, that Penn Central is not reorganizable on an income basis within a reasonable time

[22] *In re Ann Arbor Railroad Company*, Bky. No. 4-90833, E.D. Mich.

*In re Boston & Maine Corporation*, Bky. No. 70-250-F, D. Mass.

*In re Central Railroad Company of New Jersey*, No. B401-67, D. N.J.

*In re Erie Lackawanna Railway Company*, No. B72-2838, N.D. Ohio.

*In re Lehigh Valley Railroad Company*, Bky. No. 70-342, E.D. Pa.

*In re Reading Company*, Bky. No. 71-828, E.D. Pa.



under Section 77 within the meaning of Section 207(b) of the Act (JA 84-103). Having so found, the Court considered it unnecessary to make the public interest determination contemplated by Section 207(b).[23]

Thereafter, the Reorganization Court, having held full evidentiary hearings, entered its 180-Day Decision finding that the Act does not provide a process which is fair and equitable to the estate of Penn Central in the following respects (JA 149-51):

> "1. The Act requires [Penn Central] to continue to operate the railroad, for its own account, until such time as the Final System Plan is implemented. There is no prospect that such operations can be conducted, except at huge losses. The Act makes no provision for compensation to the estate or its creditors for the resulting erosion.
>
> 2. The Act does not permit judicial determinations with respect to the values of the properties to be conveyed, or the value and adequacy of the consideration to be paid for such properties, in advance of the conveyance, and the subsequent judicial review of these matters does not affect the finality of the conveyance.
>
> 3. Since USRA, with the approval of Congress, is to determine the nature of the consideration to

[23] The New Haven Trustee (solely on jurisdictional grounds) and the Commonwealth of Pennsylvania appealed the 120-Day Decision to the Special Court, but the appeals were dismissed. Those parties have also appealed to the Third Circuit Court of Appeals on the same grounds. The Court may wish to take notice of the fact that the courts overseeing the reorganizations of the Erie Lackawanna and the Boston & Maine found that those lines were capable of being reorganized on an income basis within a reasonable time under Section 77 and that the public interest would be better served by continuing with such a reorganization. Order No. 234 (Doc. No. 688) in the Erie Lackawanna proceedings and Memorandum dated May 2, 1974 in the Boston & Maine proceedings.

be paid for the transferred assets, and judicial remedies are limited to reallocation of the securities proposed by USRA and the entry of a deficiency judgment against Conrail, the Act does not assure that the [Penn Central] estate will actually receive the equivalent of the 'constitutional minimum' value of the properties conveyed.

4. It is beyond the power of a reorganization court, including the Special Court, to order the conveyance of properties free and clear of liens in exchange for common stock, except perhaps to the extent that the sale price exceeds the net liquidation value of the property conveyed. This is particularly true where there is no guarantee of the value of the stock or its future earnings.

5. Implementation of the Final System Plan pursuant to the Act cannot be regarded as equivalent to consummation of a plan of reorganization, or a step in or part of such a plan of reorganization, because (a) the conveyances would become irrevocable before there would be any opportunity for participation by the estate or its creditors in the valuation process, (b) the conveyances would become irrevocable in advance of any judicial review of fairness, valuations, etc.; (c) the conveyances would become irrevocable before there could be any determination of the relative rights of creditors and the value of their security or their treatment in the reorganization process; the creditors would merely lose their liens on the properties conveyed.

6. Implementation of the Final System Plan cannot be legally justified as a sale of property by the Trustees, or as consummation of a reorganization plan, for the reasons specified above. To the extent that the Act represents an exercise of the power of eminent domain, it is unfair and inequitable, in that it does not provide for just compensation in cash or its equivalent, assured in advance of the conveyance. There is no other basis upon which the constitutional validity, or the fairness and equity, of implementation of the Act can be upheld.



7. Under the provisions of the Act, the only judicial determinations which can have significant effect in protecting the rights of the railroad estates and their creditors must be made at a time when substantially all of the information pertinent to those judicial decisions is unknown and unknowable."[24]

## Summary of Argument

The Court below did not, as Appellants would have it, launch an indiscriminate and premature attack upon the Rail Act. Rather, upon a fully developed record,[25] the Court found clear and present harm in the impact of certain provisions of the Act upon constitutionally protected interests of the plaintiffs. It used its equitable powers to tailor an injunctive decree to fit tightly the wrongs which it found. In this it was neither premature nor extravagant; it was correct and prudent. Its order is sustainable not only upon the grounds which it assigned for its action, but also upon other grounds which, in the exercise of its judicial restraint, it declined to reach.

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[24] The Reorganization Court reached the conclusion that the Act does not provide a process fair and equitable to the estates of the Secondary Debtors for the same and additional reasons (JA 153-56).

[25] No party has contended that the extensive record contains any genuine issue of material fact, and all parties proceeded on motions under Fed. R. Civ. P. 56. The bulk of the record was imported from the Penn Central reorganization proceedings, by agreement, and Judge Fullam, who has supervised that reorganization for over four years, was a member of the three-judge Court.

## I.

The Court below found Section 304(f) of the Act to be unconstitutional in that it forced interim rail operations upon Penn Central until a Final System Plan was adopted. Since these operations were incontrovertibly at massive losses, the Court found that they posed a serious likelihood that the bankrupt estate would be unconstitutionally eroded before a Final System Plan could be effectuated. Holding that Section 303 of the Act did not assure compensation for the losses thus incurred, the Court concluded that the provisions were unconstitutional under the Fifth Amendment.

Appellants attack this conclusion upon the grounds that (a) the Act in their view does not require such continued interim operations; (b) the impact of compelled operations under existing financial conditions is not demonstrably confiscatory; and (c) even if interim operations at a loss were compelled, such a result is nonetheless constitutionally permissible because such operations are required by the public interest.

The Court below correctly appraised the record as to the imminence of harm to plaintiffs by virtue of the inexorable economic effect of plainly required interim operations. Given that harm the Court rightly refused to countenance a new rule of expropriation for industries affected with a public interest as was implicit in Appellants' position.

Section 304(f) forbids discontinuance of rail service or abandonment of lines to any significant degree pending completion of the Final System Plan. Indeed, that was the manifest purpose of Section 304(f) as is evident from its terms, its legislative history, and from subsequent utterances of its authors directed to those charged with its administration. The duration of these continued operations would be a minimum of 17 months and could extend indefinitely as either USRA requests legislative extensions



of time for its task,[26] or as Congress delays adoption of a Final System Plan. During this interval, permissive abandonments under Section 304(f) could not cure the effect of massive losses being sustained by the estate, nor would public groups likely acquiesce in any such abandonment program.

Because Section 304(f) in as many words precludes any federal court from authorizing abandonment or discontinuance of service, the Court below properly recognized that it had before it the last clear chance to prevent the procedures of the Act from exacting an unconstitutional toll of the estate and the claimants entitled to participate in it.

Upon the record, the interim operations required by the Act do confront the estate with the unavoidable prospect of enormous continuing losses and continued accumulation of huge priority claims. These continuing loss operations afflict the estate with a demonstrable likelihood of financial and physical erosion. This conclusion was amply justified upon an uncontested record of massive deficits in net operating income, the issuance of Trustees' Certificates priming the secured creditors, the aggregating of accrued but unpaid real estate taxes and leased line rentals, the deployment in hopelessly losing operations of non-recurring income and of income derived from non-rail enterprises, and the uncontested likelihood—found as fact by the Reorganization Court (JA 92-100)—that all these would

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[26] A postponement of 120 days for presentation to Congress of the Final System Plan has now authoritatively been proposed in S. 4003 introduced by Senators Hartke, Magnuson, Cotton, Pearson and Beall on September 16, 1974 and that day referred to the Senate Committee on Commerce, the text of which, with introductory comments by Senator Hartke and supporting letters from the Chairman of USRA and the Chairman of the ICC, is printed in the Congressional Record of that date (daily ed.) at S16619-20. The Bill would extend by 120 days the statutory deadline for both the preliminary system plan and the Final System Plan, and would authorize an increase in USRA's administrative expenses from $26 million to $40 million.

continue at enormous rates, interminably. The finding of the Reorganization Court that Penn Central was not capable of an income-based reorganization set the further course of the Penn Central reorganization apart from those reorganization cases which were premised upon a feasible recapitalization of the debtor railroad so that railway operating income would adequately support the new capital structure.

Apart from the fact that the findings of the Reorganization Court on such subjects are entitled to special weight, *New Haven Inclusion Cases*, 399 U.S. 392, 463, Appellants are plainly wrong in their contention that erosion does not pose a demonstrably immediate threat to the Penn Central estate. Their contention that "appreciation" in the estate derived from general economic inflation offsets its erosion is wrong as a matter of law. Assuming *arguendo* that inflation did produce a net increase in the value of the properties of the estate, the investors in Penn Central are constitutionally entitled, once there ceases to be a reasonably likely prospect of reorganization, to place their funds in appreciating investments which are not sapped by staggering losses. Further, Appellants' figures, designed to demonstrate that the erosion has been offset by asset appreciation, are wholly unreliable. The Court was correct in recognizing the existence and inevitability of continued attrition of the estate, and protecting Appellees against its ravages.

Such compulsory operations to the manifest detriment of the estate are not constitutionally permissible in the public interest in the absence of either (a) assurance of just compensation or (b) reasonable present assurance that the outcome of the procedures under the Rail Act will produce at least the liquidation values to which the creditors of the estate are presently entitled, plus conpensation for the erosion they sustain during the course of those procedures.



The vice of the Act in this respect is that it compels interim loss operations without providing either assurance of compensation or a reasonable present assurance of reorganizability. That this is done for an ostensible public purpose merely poses the constitutional question; it does not answer it. The Fifth Amendment presumes that takings are for a public use. It does not excuse the payment of just compensation on that account; it commands just compensation on that account.

This Court has always recognized the principle that when public purposes are to be served, in all fairness and equity the public rather than private parties should bear the costs. *Armstrong* v. *United States*, 364 U.S. 40, 49; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 602. The cases have consistently recognized the difference between the uncompensated abatement of a nuisance which is permissible, and the uncompensated compulsory provision of a public good, which is not. Compare *Atchison, T. & S.F. Ry.* v. *Public Util. Comm'n*, 346 U.S. 346, with *Nashville, C., & St.L. Ry.* v. *Walters*, 294 U.S. 405. This well-settled distinction is basic to the line of cases, epitomized by *Brooks-Scanlon Co.* v. *Railroad Comm'n*, 251 U.S. 396, which hold it unconstitutional to compel continued hopelessly losing rail operations without compensation upon a claim that such operations are required by the public interest. Those cases embody a fundamental principle of constitutional law, have repeatedly been relied upon and are not, as Appellants suggest, obsolete.

All the cases in which the doctrine of railroad reorganization under Section 77 has been developed involved proceedings in which, by proof or by hypothesis, there existed a reasonable likelihood that upon recapitalization the enterprise could be reorganized and going concern values, in excess of then present liquidation values, could be achieved. Railroad investors do, under those cases, assume the risk that the accomplishment of such a re-

organization may require them to abstain for a reasonable time from the exercise of creditors' remedies. These cases do not stand for the proposition that, after such reasonable prospect of reorganization has been extinguished, a similar abstention can be forced upon the creditors without just compensation, or that successive ephemeral prospects of reorganization can be held out as justification for indefinite suspension of their rights. See, e.g., *New Haven Inclusion Cases*, 399 U.S. at 460-61, 466.

Here, as is apparently conceded (J. Doc. No. 64 at 68-69), the Rail Act in its terms does not provide adequate funding to assure just compensation for the interim erosion which the estates are, by its terms, compelled to suffer. Nor, upon the record, can it fairly be said that the Act holds out sufficient assurance of a reasonably likely reorganization to have required the Court below to abstain from granting the relief prayed for. An examination of the provisions of the Act indicates that its terms are materially inadequate to compensate for the assets ultimately to be conveyed and, *a fortiori*, are incapable of providing assurance of eventual recoupment of erosion losses. The interim operations are thus required by law under circumstances that preclude recovery of the values thereby lost to the estate either by direct compensation or reasonably foreseeable reorganization. The Court below correctly branded that result unconstitutional and enjoined it. Unlike the cramdown provision of Section 77 to which Appellants resort by analogy, no court has the power under the Act to furnish the requisite assurance of value, either by interim surveillance of the reorganization or by ultimate determination, in advance of consummation of the conveyances, that the Final System Plan is feasible or that the consideration afforded by the Act is fair and equitable.

Appellants take misguided comfort from the decision of this Court in the *New Haven Inclusion Cases*, 399 U.S.



392. Although the New Haven reorganization appears to have been the model for the Rail Act, the latter radically differs from the former in certain material respects which highlight the unconstitutional impositions of the Act. Most notably: The compulsory character of the Act contrasts with the voluntary nature of the New Haven inclusion. The absence of any judicial supervision of the procedures of the Act as they lead to inclusion in the Consolidated Rail Corporation created by the Act ("Conrail") contrasts with the careful scrutiny accorded the New Haven reorganization and the terms of its inclusion in Penn Central. And the assurance enjoyed by the New Haven investors (woebegone as it turned out to be) that they would receive an assured per parcel liquidation value for their properties when those properties were included in a mammoth railroad with assets of a value twenty times larger than the value of the conveyed assets, contrasts starkly with the legitimate pessimism that must be accorded the prospect that fair value for the conveyed rail properties can be eked out of a Conrail which amalgamates portions of the bankrupt railroads themselves.

## II.

The deficiencies of compensation intrinsic to the Act are not met by any putative remedy at law under the Tucker Act.

Analysis of the Rail Act itself and a fair reading of its legislative history demonstrate that Congress made explicit provision in the Act (a) for a mechanism of compensation that was to satisfy the "constitutional minimum" to which the estates were entitled (and thus exhaust any cause of action which could lie in the Court of Claims) and (b) for a Special Court in which the valuation and compensation process was exclusively vested.

The legislative history and its epilogue show that Congress affirmatively intended that claimants against the bankrupt estates not have recourse to the United States Treasury for redress of any grievances allegedly done them under the Act. This conclusion is inescapable in the light of repeated declarations in the conference report, the reports of Senate and House Committees, and the statements of the authors and managers of the bill in the course of debate in both Houses. It is reemphasized further by the explicit statements of the members of the sponsoring House Committee in oversight hearings conducted after the Government and USRA had submitted to the Court below a brief which held out a Tucker Act remedy as an adequate remedy for any problems of the Act. Lest any doubt remain about the subject, thirty-seven members of Congress, including certain sponsors of the Act, have filed with this Court a brief *amicus curiae* which concludes with the categorical observation that if a deficiency judgment against the United States under the Tucker Act "is necessary to make this Act constitutional, the Act must fall since the legislative history and the language of the Act are clear that no deficiency judgment against the U.S. is authorized by the Act." Brief *Amicus Curiae* at 22.

All of this makes clear that the Tucker Act is not available to supplement the constitutional deficiencies of the Rail Act, as a matter of law. Moreover, the uncertainty created by the explicit declaration of Congress and Congressmen that such recourse would not be tolerated renders the putative remedy at law inadequate.

## III.

The injunctive relief entered below was timely and proper. It was timely because under the provisions of the Act imminent constitutional harm threatened plaintiffs and there was no other appropriate method of redress.



The relief was proper because it was tailored to prevent only those wrongs which were clearly ripe and went only so far as necessary to prevent their occurrence. The injunctive provisions show, when read together, a compelling and proper concern that the Act ousted the federal courts from their proper functions of preventing and curing constitutional violations. Section 304(f), which provides for continued operations "notwithstanding" any contrary decree of a federal court, was enjoined only to the extent it purported to authorize disregard of such decrees. Section 303, which precludes the Special Court from refusing to transfer rail assets, irrespective of the inadequacy of compensation for erosion, was enjoined only insofar as inadequate compensation ensued from that mechanistic provision. So much of Section 207(b) as required dismissal of the pending Section 77 proceeding—plainly an *in terrorem* provision to inhibit the reorganization courts in the 180-day proceedings—was excised to abate that threat.

Finally, certification of a Final System Plan was enjoined, not irrationally, as Appellants suggest, but to preserve the continuing jurisdiction of the federal courts over the subject matter. By the terms of Section 303(b)(2) of the Act, upon certification of a Final System Plan, the procedures thereafter become mandatory, the harm is inexorable and "such conveyances [required by the Final System Plan] shall not be restrained or enjoined by any court." The injunction against certification of a plan was necessary to prevent ultimate ouster from jurisdiction of the federal courts and to protect the enforceability of the writs already issued.

None of this was an abuse of discretion; it was, instead, an extraordinarily astute use of discretion in the face of an Act posing enormous provocations to the equity jurisdiction of the Court below.

## IV.

The restraint exercised by the Court below is further illustrated by the fact that it refrained from reaching several issues presented to it for decision and decided certain of the issues which it did dispose of on narrow rather than broad grounds. Its order is, therefore, sustainable, not only on the grounds which it assigned, but upon other grounds as well.

For example: the Act does effect an uncompensated taking of Appellees' property by means of compulsory conveyances without the just compensation required for such a taking. The provisions of the Act which the Court below enjoined were all integral parts of the uncompensated taking and the writ entered below is justifiable on that alternative ground.

Provisions of the Act, most particularly Sections 207 and 303, amend or supersede Section 77 and significantly affect the rights of creditors in respect of the bankrupt estate. They are, consequently, laws on the subject of bankruptcies, but they are in terms applicable only to a region defined in the Act as embracing seventeen states of the Northeast and Midwest. They run afoul of the constitutional command that laws on the subject of bankruptcies shall be "uniform throughout the United States." *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 188. The coincidence that the only Class I railroads in reorganization lie within the region does not justify or permit a departure from the well-established rule that a bankruptcy law must in terms be geographically uniform. The provisions enjoined below are of this character and the writ enjoining their enforcement may be sustained on this alternative ground as well.

Finally, the procedures of the Act strip the federal judiciary of its power to exercise an informed discretion over the fundamental issue of whether the estate and its claim-



ants are receiving fair and equitable treatment. At the only juncture under the Act when the reorganization court is allowed to make a judgment about the fairness of the process of the Act, it is disabled by the provisions of the Act from knowing what the outcome of that process can be. When the Special Court can know what the outcome of the Final System Plan may be, it is specifically disabled from doing anything about it. No other court may intervene at all to protect the estate or its claimants once the Act takes effect over them. These provisions separately and together effect a deprivation of the property of Appellees without the fundamental elements of due process. The operative provisions of the Act that would lead to this result are also properly enjoined on that basis.

## ARGUMENT

### I.

### The Rail Act is Unconstitutional in that It Requires Mandatory Interim Operations at Hopeless Losses Without Providing Assurance of a Legal Remedy to Furnish Fair and Just Compensation for Erosion Beyond Constitutional Limits.

The Court below held that Sections 304(f) and 303 of the Act offend the Fifth Amendment because they compel Penn Central to continue rail service during the indefinite period required under the Act to adopt the Final System Plan, without providing just compensation for the erosion of the Penn Central estate that the Court below determined was likely to occur during that interval.

Appellants attack that determination essentially on the grounds that: (a) such interim operations are not required; (b) the impact of such continuing operations at massive losses is not erosive of the estate; and (c) even if continued operations were required under conditions that eroded the

estate, such a result is constitutionally permissible because of the public interest character of the railroad industry.

Appellees urge this Court to reject these contentions.

(1) Appellants' first argument is based upon a labored reading of the statute designed to suggest that interim operations of Penn Central's system may not be required at all. This argument is at odds with the language, policy and history of the Act, as well as practical considerations which this Court should not ignore.

(2) Appellants' second contention asks this Court to find that all the parties to the reorganization proceeding, including the Penn Central Trustees, as well as all the courts which have examined the condition of the estate in recent months, are irresponsibly wrong in their uniform view that the massive losses being sustained by the estate will continue and will erode *someone's* interest in the estate during the interim period. This argument is based upon an unjustifiable optimism in the face of an appalling financial picture, and upon a construct of "erosion" which is wrong in theory and in fact.

(3) Finally, Appellants' third contention either requires a blind deference to Congressional hopes that the Act can create a possibility of successful reorganization where none before existed, in the teeth of clear evidence to the contrary, or invites this Court to announce an unprecedented rule that industries affected with a public interest may be temporarily expropriated without assurance of fair compensation. That argument, however, is unsupported and unsupportable by evidence in the record or by any precedent or principle of law to which this Court has ever shown hospitality.



**A. The Act Does Mandate Interim Operation of the Penn Central System.**

Section 304(f), which the Court below held required interim operations, reads in full as follows:

> "*Interim Abandonment.*—After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association [USRA] and unless no affected State or local or regional transportation authority reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority."

Appellants' contention that this language can be read to *permit* termination of rail operations is unconvincing and was properly rejected below.

An ultimate purpose of the Act was to obviate any threat of termination of operations by any railroad in reorganization until the essential rail properties could be identified and transferred to Conrail. In service of this objective, Section 304(f) specifically provides that after the date of enactment "no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act . . ." unless authorized to do so by USRA and unless there is no reasonable objection by affected states, localities or regions. The other provisions of the Act to which Section 304(f) refers are those governing abandonment of lines which, pursuant to a Final System Plan, the prior existence of which their terms assume, are not to be conveyed to Conrail or to other railroads. That determination, however, cannot be made until the Final System Plan emerges many months from now.

Were not the intention of Congress to preclude abandonments or service discontinuance until implementation of the Final System Plan—that is, to compel interim operations—plain enough from the language of Section 304(f), other Congressional utterances have left the matter well beyond doubt. Elsewhere in the Act itself, the intention to freeze operations as they were when the Act became effective is made equally explicit. Section 213(a), which authorizes the Secretary of Transportation to make limited payments to railroads pending the implementation of the Final System Plan, requires "that recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act." That provision was invoked in connection with the first payment under Section 213 to the Penn Central Trustees, and, over the objection of creditors, the Trustees entered into an agreement to maintain such service (J. Doc. No. 14).

Furthermore, the purpose of Section 304(f) was explicitly adverted to in the course of Senate debate on the conference bill which became the Rail Act. Under stiff questioning from Senator Allen, Senator Hartke, its Senate floor manager, explained:

> "Mr. Allen. I understand the Senator to say a moment ago that there would be no abandonment for 18 months.
>
> "Mr. Hartke. No. *I said there would be no abandonment in the region while the final system plan is being formulated.*
>
> "Mr. Allen. In other words, there is a moratorium on abandonment for 18 months.
>
> "Mr. Hartke. For the region that is correct. That is absolutely necessary. You cannot let the lines be abandoned and then try to put them back in business without a great deal of expense. That is one of the problems we are faced with." 119 Cong. Rec. S23783 (daily ed. Dec. 21, 1973) (Emphasis added).



A more explicit refutation of Appellants' permissive reading of the Act would be hard to imagine. That this was the Congressional purpose, however, could come as no surprise to Appellants since they were forcefully apprised of that intention by the House manager (and co-author of the Act) in his letter of April 26, 1974 to the Under Secretary of Transportation. See Trustees' Brief, Appendix B, at 7a, 8a. Angered by the prospect that Penn Central might be encouraged by the Department of Transportation to apply to USRA for the abandonment of "hopelessly uneconomic lines," Congressman Adams remonstrated in part as follows:

> "The purpose of this letter is to emphasize to you that such an endeavor by DOT and the Trustees of the Penn Central would be completely contrary to the intent of Congress in adopting sections 213, 215 and sections 304(f) of the Regional Rail Reorganization Act.
>
> • • •
>
> "In summary, what I said then, and repeat to you now, is that *our intention was to preserve the status quo of rail service in the Northeast during that critical time* and to allow full public comment on abandonment proposals. The purpose of this procedure was twofold: first, to allow careful study of the structure of rail service in the Northeast and, secondarily, to allay public fears regarding wholesale abandonments of rail service. . . .
>
> • • •
>
> "Therefore, it seems to me that DOT should give the strictest adherence to Congressional intent in administering the first stages of the lengthy planning process which the Act sets forth. To encourage USRA to allow a series of rail abandonments during the planning period would be both harmful to cooperation between Congress and the DOT, *and contrary to the intention of the Act.*" (Emphasis supplied.)

Therefore the Act in terms accurately expresses the intention of its authors, articulated before its passage and since, that there are to be no abandonments of even "hopelessly uneconomic lines" during the interim planning process. That process must last at least 17 months from the effective date of the Rail Act, and may well last much longer. Any postponement [27] of the deadlines set in the Act would necessarily increase the time span during which interim operations are compelled and erosion sustained. And, if the Congress reacted unfavorably to the Final System Plan when first submitted, further delays of unpredictable duration could eventuate while such objections are compromised.[28]

Nor is it persuasive for Appellants to argue that, upon application to USRA, it may be assumed that authorization to abandon lines would be forthcoming. In the first place, the overwhelming concern of USRA is the present operation of the lines which are candidates for inclusion in the Final System Plan; it strains credulity to expect USRA to authorize abandonment of lines in the absence of a prior determination that they will be surplus. Secondly, the right to terminate operations which is at issue here is system-wide. The Wyer, Dick feasibility studies show that

[27] Such a postponement is now being considered in Congress. See n. 26 at 25, *supra*.

[28] It is not entirely speculative to believe that such Congressional objections might well arise. There exists an obvious tension, for example, between the declared purpose of producing a self-sustaining rail operation (Rail Act, Section 101(b)(2)), and the provision of service adequate to meet the needs of the region (Rail Act, Section 101(b)(1)). These competing interests have already emerged as the preferred positions of different agencies charged with involvement in the planning process: the Department of Transportation emphasizes economic viability and the Rail Services Planning Office ("RSPO") of the ICC, established by the Act, emphasizes maximized services. Compare, *e.g.*, J. Doc. No. 62 with J. Doc. No. 63. These tensions will predictably find their way to the floor of Congress as it considers the Final System Plan in the context of pressure upon those members whose constituencies stand to lose significant rail service.



not even the elimination of over 6,000 route-miles of track combined with other unachievably optimistic preconditions could produce profitable operations. Whatever slim possibility there might be for USRA to authorize, with appropriate speed, abandonment of a particular segment of potentially surplus line, there is no practical likelihood that USRA would authorize the termination of service on the massive scale necessary to abate unconstitutional erosion of the Penn Central estate. To do so would be tantamount to an abandonment by USRA of its expectation of realizing any plausible Final System Plan.

Not only would such abandonments be insufficient to stanch the flow of losses, but serious objections could be expected from RSPO on the ground that such abandonments would be inimical to the public interest. These objections, together with those expressly contemplated by Section 304(f) from state, local and regional transportation authorities, would inevitably delay and might well stall altogether any program of abandonments, especially one sufficiently large to make a dent in the operating losses being incurred by the estate.

The fact that USRA itself does not consider Section 304 as an invitation to wholesale abandonments now is shown by its response to abandonment requests which have already been filed by the Penn Central Trustees, to the effect that USRA had no procedures for processing such requests (J. Doc. Nos. 65, 66).

It will not do to argue, as Appellants do, that the Penn Central estate would in any event have to undergo time-consuming abandonment procedures in the absence of the Rail Act. Even if such procedures are required the estate would nonetheless be "constitutionally entitled" to a certificate of abandonment from the ICC "acting with appropriate speed under § 1(18) of the Interstate Commerce Act." *New York, N.H. & H.R.R. First Mtg. 4% Bondholders' Comm.* v. *United States*, 305 F. Supp. 1049, 1055 (S.D.N.Y. 1969), *vacated on other grounds sub nom. New Haven Inclusion Cases*, 399 U.S. 392. See also *New Haven Inclusion Cases* at 459-67.

There exists, then, an explicit statutory command that interim operations be continued, and the massive losses that will thereby be sustained cannot be avoided with appropriate dispatch by recourse to any agency having authority to excuse the estate from the command of the Act.

To avoid the impact of the plain meaning of Section 304(f), Appellant USRA complains (USRA Brief at 61-66) that the Court below misread the Act. The section, so goes the argument, "could and should have been construed to confer approval power [with respect to interim abandonments and service discontinuances] only within constitutional limits as the courts may declare them." *Id.* at 64. USRA goes on to argue that "[a] Reorganization Court finding it constitutionally necessary to order a discontinuance of service or abandonment of properties would have as much power both to make this finding and to have the resulting orders carried out without the injunction issued by the district court as it has in light of the injunction." *Id.* at 67-68.

USRA's argument in this regard flies in the face of the very language of Section 304(f) forbidding any railroad in reorganization from discontinuing service or abandoning any line of railroad "*notwithstanding any provision of any . . . decision or order of . . . any Federal court.*" By the terms of the Act itself the reorganization courts and all other federal courts, including, presumably, this Court, are explicitly ousted of their jurisdiction to order discontinuance or abandonment.[29] USRA's argument is tantamount to a contention that the statute can be sustained only if it means the exact reverse of what it says.[30]

[29] Indeed, this concern with court-ordered terminations is consistent with the Congressional apprehension over the likelihood of such an event which stimulated passage of the Act in the first place.

[30] The Court below framed its injunction to restrain the enforcement of Section 304(f) only "with respect to any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary

*(Footnote continued)*



In short, the Act does compel continued loss operations and its constitutionality must be appraised, as it was below, in light of that grim fact of life.

### B. Penn Central Interim Operations Impose Enormous Losses, Accumulate Priority Claims and Cause Erosion of the Value of the Estate.

From inception the Penn Central reorganization proceedings have had an indisputable history of mammoth and irreversible losses, extensive accumulation of prior claims and erosion of the value of the estate. All these are matters in the record here, as is the fact that similar losses, accumulations of priority claims and financial and physical erosion will continue unabated so long as Penn Central is required to continue rail operations.

#### 1. *Post-Bankruptcy Financial Results through December 31, 1973.*

From June 21, 1970 through December 31, 1973, Penn Central's ordinary income losses aggregated $851 million (FF 1, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1).

During this period the growth of priority claims kept pace with the losses:

(a) Trustees' Certificates were issued in the amount of $100 million (FF 3, 4, JA 89-90; Stip. No. 15, JA 208);

(b) Unpaid and accrued taxes accumulated to the extent of $241 million (JA 37; FF 2, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1); and

*(Continued footnote)*

for the preservation of rights guaranteed by the United States Constitution." The remedy was couched to excise from the Act language which otherwise would prevent any judicial recourse by an aggrieved owner or creditor, the same language which USRA would excise by creative interpretation. But the language is in the Act, and wrongly so; the Court in enjoining its enforcement was plainly not precipitous. See Point III, *infra*, at 103-04.

(c) Unpaid leased line rentals accrued in the amount of $101 million (JA 37; FF 2, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1; Stip. No. 13, JA 208).

These three items of post-bankruptcy priority claims alone total $442 million.

Of equal importance is the source of funds expended and forever lost through their application to deficit rail operations. In addition to operating funds, other funds so applied during the period June 21, 1970–December 31, 1973, included non-recurring income in the amount of $155.3 million (including the $100 million in proceeds from Trustees' Certificates) and approximately $157 million of income from non-rail operations (JA 36-37; FF 3, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1; Stip. No. 11(a), (c), JA 206-07, 211). During this period the Trustees also had the benefit of cash available by reason of the deferral of $104 million of interest on mortgage and collateral trust debt (FF 2, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1; Stip. No. 14, JA 208). While these amounts are included in the operating loss figure, they measure the extent to which the losses were held to even that figure by draining resources from non-operating corners of the enterprise.

2. *Reasonably Foreseeable Future Financial Results after December 31, 1973.*

The record here leaves no doubt that similar massive income losses, accumulations of prior claims and deferrals will continue so long as rail operations by Penn Central are mandated. The Reorganization Court found, on undisputed expert evidence, that it is reasonable to project that during the five-year period ending December 31, 1978:

(a) Additional ordinary losses will aggregate approximately $722.2 million;

(b) Additional accrued but unpaid taxes will amount to approximately $310.7 million;



(c) Additional deferred leased line rentals will approximate $140 million; and

(d) Additional unpaid interest will accrue to the extent of $137.1 million.

(FF 12-20, 23, JA 92-96, 98; Sloane affid., J. Doc. No. 16, at 7-11; Varalli affid., J. Doc. No. 19, at 4, Ex. T-2; Guest affid., J. Doc. No. 20, at 9-10.)

On the not necessarily realistic assumption that a Final System Plan may be implemented toward the end of 1975, it is instructive that the comparable estimated figures (derived from the same sources) for only the two years 1974 and 1975 are as follows:

(a) Additional ordinary losses will approximate $434 million;

(b) Additional accrued but unpaid taxes will amount to approximately $118.2 million;

(c) Additional deferred leased line rentals will approximate $55.9 million; and

(d) Additional unpaid interest will accrue to the extent of $164.2 million.

(FF 12-20, 23, JA 92-96, 98; Sloane affid., J. Doc. No. 16, at 7-11; Varalli affid., J. Doc. No. 19, at 4, Ex. T-2; Guest affid., J. Doc. No. 20, at 9-10.)

Thus, the combination of financial results found to have occurred during the reorganization proceedings through December 31, 1973 with those found to be reasonably expected to occur in the next two years (the earliest point in time at which the effectuation of a Final System Plan could reasonably be expected) shows the following:

(a) Ordinary losses—$1.285 billion;

(b) Accrued but unpaid taxes—$359.2 million;

(c) Deferred leased line rentals—$156.9 million; and

(d) Unpaid interest—$268.2 million.

Faced with undisputed evidence of such tremendous sustained and expected losses and accumulations of prior claims, the Reorganization Court had no choice but to hold, as it did, that Penn Central could not be reorganized on an income basis within a reasonable period of time.

3. *Erosion in the Value of the Estate.*

The United States alleges that there is no adequate record evidence of erosion of the value of the estate and further claims, without citation of authority, that the basis for evaluating the impact of continuing operations on Penn Central's estate is simply a matter of comparing the amount of accumulated priority claims with the amount of alleged increases of value of carefully selected assets of the estate (U.S. Br. at 67-70).

The contention that the record is bare of adequate evidence to show erosion cannot be supported. There was abundant evidence before the Court below to justify its conclusion that the mounting losses charged to the estate would imminently harm at the very least some of the claimants who were plaintiffs in the suits before it.

Income losses must have an effect on the value of the estate; obviously funds have been expended in operations which otherwise would have defrayed obligations accrued by the Trustees. The diversion of such funds to operations in order to cover losses of such magnitude necessarily decreases the values in the estate available to satisfy claims of stockholders and creditors by creating accumulations of post-bankruptcy priority claims. One index of the effect of such losses on the value of the estate is the decrease in stockholders' equity from approximately $1,500 million at



December 31, 1970[31] to approximately $684 million at December 31, 1973.[32]

Even this measure of erosion, which shows a decrease in excess of $800 million in the value of the estate, does not fully reflect two important components in any measure of the extent of erosion. The first is the aggregate amount of accumulated prior claims, admitted by the United States to be at least $457 million (U.S. Br. at 67). With post-bankruptcy income losses of $851 million and $457 million in admitted post-bankruptcy prior claims, it is inconceivable that there has been no decrease in the value of the estate available to claimants, as the United States argues. Secondly, testing the extent of erosion by the diminution of stockholders' equity does not take into account the decreases in value of non-depreciable property (such as track) by reason of inadequate maintenance. The Reorganization Court has found that, even assuming annual expenditures of $225 to $250 million for normalized maintenance of way, an additional $665 million in current dollars must be expended to remedy past deferrals (FF 10, JA 91-92; see Jackman affid., J. Doc. No. 18, at 4).

USRA argues that inflation in the value of assets may be used to offset the accumulation of prior administrative claims[33] (USRA Br. at 79), and states that "other courts"

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[31] Form A for 1970 (J. Doc. No. 34 at 201).

[32] Form R-1 for 1973 (J. Doc. No. 37 at 11).

[33] A comparison is noteworthy between portions of Part D of the Appendix (pp. 67-70) to the United States brief and Part III of the "Appendix on Fact Issues" (pp. A-14 to A-19) attached to the brief of Appellants (including the United States and USRA) filed with the Special Court in connection with their appeals from the 180-Day Decision.

In both cases, the specified portion of the Appendices represents an attempt to show that increases in the value of assets of the estate since bankruptcy offset the accumulation of prior administra-

*(Footnote continued)*

have so held, citing only a footnote to *In re Boston & Maine Corp.*, 484 F.2d 369 (1st Cir. 1973). Even that reliance is misplaced. The cited footnote is merely descriptive of a particular fact in a particular situation and does not purport to establish a rule of law. The point there at issue was one of standing to challenge the propriety of continuing the reorganization proceedings where, in that court's view, there was ample hope of a successful conclusion. Moreover, at a time when inflation is so great as to increase asset values to the extent that, as Appellants appear to claim, huge operating losses and prior claims are virtually rendered of no effect in calculating the value of the estate, Appellants' theory becomes particularly inequitable, in that claimants are deprived of their right to withdraw their capital from an enterprise in which the appreciations caused by an inflationary economy are offset by massive operating losses, and to reinvest in other enterprises reflecting such appreciations in value without offsetting losses. The right to withdraw capital from such

*(Continued footnote)*
tive claims. Also in both cases the major element of such alleged increases is "Increases in the Value of the Plant Equipment [*sic*]." There, however, the similarity ends. In the brief filed by Appellants with the Special Court, dated August 5, 1974, the amount of such increase was alleged to be between $45 and $100 million. On the other hand, the brief filed by the United States with this Court, on the basis of the identical record, claims that such increases range between $85 and $360 million. The increase in figures, which were inexplicable to begin with, is itself nowhere explained.

In both the brief filed with the Special Court and the brief filed with this Court, Appellants acknowledge the accumulation of prior administrative claims in at least the amount of $457 million. In the Special Court brief the total increase in value of the specified assets was alleged to be between $227.2 and $314.2 million, resulting in a showing of acknowledged erosion, in excess of claimed appreciation, on Appellants' own basis, of from $142.8 to $229.8 million. This erosion is 2.5 to 4 times the amount of erosion ($60 million) which Judge Anderson found impermissible in the New Haven reorganization proceedings. See *In re New York, N.H. & H.R.R.*, 304 F. Supp. 793, 800 (D. Conn. 1969), *aff'd in part sub nom. New Haven Inclusion Cases*, 399 U.S. 392, 466.



losing investments is, of course, squarely recognized in *Brooks-Scanlon Co.* v. *Railroad Comm'n*, 251 U.S. 396. And this conforms to the purpose of a Section 77 reorganization, which is to attempt to develop an enterprise which has going concern value, not to maintain an irreversibly losing status quo, offset only by inflationary increases in asset values.[34]

The Court below was, therefore, correct in holding that continued operations under the Act would foreseeably threaten the Penn Central estate and its stockholder and creditors. It was neither premature nor unsound in this conclusion.

The constitutional significance of such compulsory operations turns on the necessity for and availability of methods of recouping such losses under the Act. To that we now turn.

### C. Compulsory Interim Operations are Unconstitutional in the Absence of Reasonable Present Assurance of Reorganizability under the Act or an Assurance of Just Compensation.

#### 1. *The Public Interest in Continued Service Does Not Justify Mandatory, Uncompensated Interim Operations.*

Appellants urge this Court to reverse, in part upon the ground that the public interest requires the Penn Central estate to bear compulsory, uncompensated erosion because that risk is attached to investments in the railroad industry by virtue of its public service character. That argument extends beyond any limit previously recognized by this Court the impositions that may be laid upon invest-

[34] In arguing that the value of the estate has increased since bankruptcy, the United States also argues (U.S. Br. at 68) that since the Trustees spent approximately $358 million on track replacement, the value of the estate must necessarily have been substantially increased. This argument cannot be sustained because (among many other reasons), as discussed above, the amount of deferred maintenance of way greatly exceeds that amount.

ors in an industry affected by the public interest and, as applied in this case, is unsupportable by principle or precedent.

The thesis of the proponents of the Act is that continued operations and submission to the hazards of ultimate conveyance are necessary to achieve the continued rail service that Congress has declared to be in the public interest (Sections 101(a), 206(a)). But, as Judge Fullam trenchantly observed in concurring below, "the magnitude of the public interest in continued rail service cannot justify treating these rail properties as if they were already public property" (JA 79).

It is a seminal principle of our constitutional structure that the public should bear the cost of devoting private property to public uses. That continued interim operation to the detriment of the estate may be required by the public interest is the beginning, not the end, of the constitutional inquiry under the Fifth Amendment.

This Court has long recognized the elementary character of this principle. It was succinctly framed (per Brandeis, J.) in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 602:

> "For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

See also *Armstrong* v. *United States*, 364 U.S. 40, 49.



The invocation of the public interest so freely employed by Appellants does not have the talismanic force which they ascribe to it. Conceding that the rail properties of the estate are being put to public use, there remains the question of whether they may be put to that use by governmental compulsion at the cost of their private owners.

The principle that private property may not be put coercively to public use without compensation has developed a doctrinal refinement as this Court has explored the frontier between regulation and takings. The cases read together seem to hold that the Government, in the exercise of its police power, may diminish or extinguish the value of property, without compensation, but within quantitative limits, in order to abate a nuisance which that property produces. See, e.g., *Atchison, T. & S.F. Ry.* v. *Public Util. Comm'n*, 346 U.S. 346 (railroad properly assessed the costs of removing hazardous grade crossings which it constructed); *Miller* v. *Schoene*, 276 U.S. 272 (trees may be destroyed to prevent spread of disease).

There is no suggestion that the Government has set about abating a nuisance here; instead it seeks to create an affirmative public advantage. This Court has consistently recognized that the compulsory commitment of property interests for the production of a public good is different from the exaction that may be justified in nuisance abatement cases, and has held that, when property is put by force of law to the production of an affirmative public good, just compensation is required. See, e.g., *Nashville, C., & St. L. Ry.* v. *Walters*, 294 U.S. 405 (railroad cannot be required to bear costs of improving traffic flow on adjacent highway).

Moreover, the "principle of fairness" expressed in the Fifth Amendment (*United States* v. *Dickinson*, 331 U.S. 745, 748), which forms the basis of its "political ethics" (*United States* v. *Cors*, 337 U.S. 325, 332), recognizes quantitative limits on the exaction that the putative public

interest can compel. The question in such cases, so Justice Holmes put it, "narrows itself to the magnitude of the burden imposed." *Interstate Consol. St. Ry.* v. *Massachusetts*, 207 U.S. 79, 87. See also *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413, 415.

The Act neither attempts to abate a nuisance created by Penn Central nor does it impose burdens of inconsequential magnitude on the estate. On the contrary, it imposes enormous economic burdens on the estate of Penn Central and upon Appellees for the purpose of achieving explicitly defined affirmative public advantages. It is far outside the ambit of uncompensated regulation tolerated by the Fifth Amendment.

This principle has been applied specifically to the compulsory continued operation of losing railroads. *Brooks-Scanlon Co.* v. *Railroad Comm'n*, 251 U.S. 396; *Bullock* v. *Railroad Comm'n*, 254 U.S. 513; *Railroad Comm'n* v. *Eastern Texas R.R.*, 264 U.S. 79. These cases all stand for the proposition that a hopelessly unprofitable railroad enterprise cannot be compelled to continue operations in order to serve an asserted public need, in the absence of compensation, over the objection of its owners and creditors.

Appellants' view of the *Brooks-Scanlon* line of cases appears to be somewhat ambivalent. While admitting, however grudgingly, that *Brooks-Scanlon* and its progeny may still be good law, Appellants nevertheless suggest that the authoritative force of these cases is dissipated because their constitutional doctrine was announced in the context of small railroads, prior to the advent of Section 77. The suggestion is plainly frivolous. In the first place, as discussed above, the *Brooks-Scanlon* cases reflect a fundamental constitutional principle that confiscation of private property to service affirmative public needs, without compensation, is unfair. The advent of Section 77 did not and could not alter that constitutional insight.



In the second place, the reorganization court in the *New Haven* case specifically reviewed the validity of the *Brooks-Scanlon* line, and, over vigorous objections to its authority lodged by the ICC, held:

> "This court, therefore, concludes that *Brooks-Scanlon* and subsequent cases, reaffirming the validity of its holding, are still applicable and determinative." *In re New York, N.H. & H.R.R.*, 304 F. Supp. 793, 804 (D. Conn. 1969).

That opinion of Judge Anderson was reviewed and quoted extensively with approval by this Court in the *New Haven Inclusion Cases*, 399 U.S. 392. See also *In re Penn Central Transp. Co.*, 494 F.2d 270 (3d Cir.), *petition for cert. filed*, 42 U.S.L.W. 3633 (U.S. May 8, 1974) (No. 73-1672) ("*Columbus Options*"); *New York, N.H. & H.R.R. First Mtg. 4% Bondholders' Comm.* v. *United States*, 305 F.Supp. 1049, 1055 (S.D.N.Y. 1969). The rule derived from these cases and the fundamental constitutional concern for fairness which they express is applicable here. Absent compensation, or "a reasonable prospect of profitable operation in the future"[38] (that is, reorganization), Appellees may not be forced by law to continue operations of their lines at relentless losses to serve a public purpose.

Nor is the Court, in the context of this case, compelled to choose between the *Brooks-Scanlon* line of cases and the line of cases epitomized by *Continental Ill. Nat'l Bank & Trust Co.* v. *Chicago, R.I. & P.Ry.*, 294 U.S. 648, and *Reconstruction Finance Corp.* v. *Denver & R. G. W. R.R.*, 328 U.S. 495. In the context of this litigation, these lines of cases converge.

The *Brooks-Scanlon* cases unequivocally hold that a carrier cannot be compelled to carry on its business at a

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[38] *Bullock* v. *Railroad Comm'n*, 254 U.S. 513, 521. *Accord, Railroad Comm'n* v. *Eastern Texas R.R.*, 264 U.S. 79, 84.

loss out of concern for the public interest without just compensation. Here, that is exactly what the Act compels.

*Continental Bank*, and other cases like it arising under Section 77, do, indeed, permit some postponement of a secured creditor's remedy of foreclosure of his lien in the public interest and in the pursuit of a feasible, fair and equitable reorganization. All of these cases, however, proceeded upon the explicit assumption that reorganization of the railroad in question was demonstrably feasible. The cases repeatedly assert that the secured creditor, though required to postpone his remedy, was at least entitled to "full compensatory treatment" for the rights which he enjoyed. See, e.g., *Ecker* v. *Western Pac. R.R.*, 318 U.S. 448, 487; *Group of Institutional Investors* v. *Chicago, Mil., St. P. & Pac. R.R.*, 318 U.S. 523, 565-66; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U.S. 510, 528-30. The reorganization cases simply do not stand for the proposition that a secured creditor may constitutionally be compelled to stand by while a hopelessly losing railroad is the object, for an undetermined period of time, of attempts at resuscitation which do not furnish a reasonable likelihood of success, and in any event, make no provision for the depletion of the value of his lien during the period of his sufferance.[36]

[36] In working out the balance required by the *Brooks-Scanlon* and *Continental Bank* lines of cases, the lower courts have for years occupied themselves with attempts to reconcile in particular cases the public interest in continued rail operations and the interest of the estate in avoiding confiscation. From those cases has emerged a set of standards which, in essence, draws the line between the permissible postponement of remedies authorized by *Continental Bank*, and the confiscation forbidden by *Brooks-Scanlon*, by ascertaining whether or not there exists a reasonably likely prospect of reorganization that will yield going-concern value, in excess of liquidation values, that is, so long as there exists "a real prospect of compensating advantage . . . through a successful reorganization." *Central R.R. of N.J.* v. *Manufacturers Hanover Trust Co.*, 421 F.2d 604, 608 (3d Cir. 1970), *cert. denied*, 398 U.S. 949; *In re Riker Del. Corp.*, 385 F.2d

(*Footnote continued*)



2. *The Rail Act Does Not Afford Any Reasonable Prospect of Likely Reorganization for the Penn Central Estate.*

Appellants quite clearly have not shown—nor, on the basis of a scrutiny of the Act in light of the Penn Central experience, could they possibly have shown—that the Act furnishes that prospect of feasible reorganizability required under the cases to warrant continued loss operations of Penn Central over Appellees' objections.

On the contrary, a review of the provisions of the Act, in the context of the record before the Court below, establishes the futility of pinning the constitutional propriety of continued operations to the ephemeral prospect of reorganization under the Act. For example:

(a) *Conrail will not be materially different from Penn Central.* The addition of the Reading, the Lehigh Valley, the Central Railroad of New Jersey and the Ann Arbor, four small bankrupt lines, will not materially alter the basic configuration of Conrail as a Penn Central, merely renamed. These railroads combined can be expected to contribute no more than 10% of Conrail's trackage and revenues.[37]

(*Continued footnote*)

124, 126 (3d Cir. 1967). See also *In re Third Ave. Transit Corp.*, 198 F.2d 703 (2d Cir. 1952); and *Columbus Options*. The last of these cases specifically addressed the issue, much emphasized by Appellants here, that the requisite showing of reorganizability can be presumed, or accepted on the *ipse dixit* of Congress, in light of the Rail Act. The court there specifically rejected the entirely executory provisions of the Act as an inadequate substitute for a judicial finding of prospective reorganizability sufficient to require continued abstention on the part of the creditors. Judicial notice of the passage of the Act, and of its terms, the court held, "cannot serve to enlarge the power of the reorganization court and the ICC to subject the property of secured creditors to a taking while, like Mr. Micawber, they wait for something to turn up." 494 F.2d at 283.

[37] The smaller lines account for about 11% of present trackage and 8% of present revenue ton-miles. "Rail Service in the Midwest and Northeast Region", a Report by the Secretary of Transportation dated Feb. 1, 1974, submitted pursuant to Section 204 of the Act (hereinafter "DOT Report"), Vol. I at 7 (J. Doc. No. 62).

The new Conrail will, in fact, be nothing but the old bankrupt Penn Central with inconsequential bankrupt appendages.

(b) *Conrail will face the same problems as Penn Central.* Since Penn Central can be expected to comprise about 90% of the System, Conrail will be facing, to all intents and purposes, the same problems that the Penn Central Trustees have fought over the past four years. If anything, Conrail's problems will be exacerbated by the laudable but expensive public service goals imposed by Section 206(a) of the Act. The conflict between these goals and economic considerations is obvious—and well illustrated by the Evaluation of the DOT Report prepared by RSPO in which RSPO says that, at its public hearings:

> "'Financial viability' was criticized again and again as an improper criterion upon which to base the decision for continuation of rail service. Rather, 'public need' emerged as the more appropriate benchmark for measuring rail service." J. Doc. No. 63 at 13.

(c) *Conrail has no reasonable prospect of viability.* No feasibility study for Conrail has ever been published, and none appears in the legislative history of the Act. Notwithstanding Appellants' extended insistence that the Act is designed to provide "new solutions" (USRA Br. at 24-40), the Act does not address itself to such fundamental problems as shifting industrial trends, changes in factory locations, and the competitive advantages enjoyed by truckers or the discriminatory division of tariffs—all of which were cited in the Congressional hearings.[38] The reason is obvious. There can be no quick and easy solution to problems of that kind—which is why the Conrail concept had a dubious future from its inception.

[38] The absence of any prospect that the Trustees could effect these "fundamental changes" was specifically referred to by the Reorganization Court as a basis for its conclusion that the Penn Central was not reorganizable (JA 88).



Moreover, Conrail is not the concept that Congress originally envisioned because it can no longer include the Erie Lackawanna or the Boston & Maine. Whatever dim prospects Conrail might have had with those lines subject to the Rail Act faded with their withdrawal. The Erie carries about twice as much tonnage as Reading, Lehigh and Jersey Central combined, and the inclusion of Erie would have increased Conrail's tonnage by more than 15%.[39] The exclusion of Erie not only deprives Conrail of this tonnage, but leaves Erie in the picture as a competitor battling to lure away even more business.

(d) *Conrail is an untried concept in railroad operations.* Appellants seem to recognize that Conrail will be little more than a reincarnation of Penn Central. They argue, however, that the reincarnation will be more lively than the original because the Act has satisfied the conditions of viability postulated by the Penn Central Trustees.[40] In succeeding paragraphs we will show that the Act cannot, in fact, satisfy these conditions. However, before proceeding to that discussion, it is important to note that the Penn Central viability studies were not projections for a conventional railroad. Quite the contrary, the viability studies projected a new kind of railroad never before tested in operation. Neither the Penn Central Trustees nor anyone else could promise that such a railroad would run at all. As the Trustees told the Reorganization Court in 1972:

> "It should be understood that the rail networks described above are not comparable to any existing railroad, particularly in the territory served by Penn Central. The 11,000 mile road to a great degree, and the 15,000 mile road to a lesser degree, represent a

[39] Statistics taken from the DOT Report (J. Doc. No. 62) Vol. I at 7.

[40] Trustees' Report of February 15, 1972 (J. Doc. No. 4), recapitulated in their Report of January 1, 1973 (J. Doc. No. 8).

> new type of transportation system consisting of main lines and high density feeder lines. The concept requires scattered shippers not located in highly industrialized areas to come to the railroad rather than having the railroad come to them." (J. Doc. No. 7, Annex 1 at 1)

It is one thing for the Federal Government to pin its hope of solving the rail crisis on a new and untried concept of railroad operation. It is a totally different thing to ask the Penn Central claimants to accept it as the equivalent of U.S. dollars.

(e) *The Penn Central Trustees' viability condition concerning abandonments will not be satisfied.* The first condition of viability postulated by the Penn Central Trustees was that the railroad plant be rationalized by eliminating excess lines. While the new Act might in theory provide a means for meeting this condition, practical political considerations point in the opposite direction. Local interests will fight significant abandonment of local lines.[41] The pressures that Congress will be under to expand the Conrail system are foreshadowed in the RSPO Evaluation of the DOT Report (J. Doc. No. 63) at 9-10:

> "The DOT Report was seen by the public witnesses as based largely on the premise that if all lines which do not make a profit are removed, the rail system will be profitable. At every hearing, the belief was voiced that the concept of large-scale abandonment as a cure for the evils of unprofitability is the wrong approach, advanced at the wrong time, and for the wrong reasons.

[41] Rail service continuation subsidies under Title IV of the Act are not a satisfactory answer because (a) the amount authorized for the federal share is plainly too small and (b) local communities are hard put to finance their existing services and do not have the resources to finance their share of rail service, which has not heretofore been their responsibility.



> "Certainly, it was the possibility of rail service discontinuance and abandonment which raised the greatest public furor. Witness after witness described the adverse economic, social, and environmental impact such actions would have on communities. It was contended that rail services discontinuance would result in market distortions, economic depression and social dislocations. Moreover, it was repeatedly stated that rail discontinuance is inconsistent with our national environmental and energy conservation policies. Decreased rail service would result in increased truck transport and greater consumption of scarce energy resources, more pollution, and increased pressures on land use for additional highway construction. Public sentiment was strong that these factors must be of primary importance in determining the final rail plan."

More important, the Wyer, Dick studies, completed after the Trustees first stated their conditions of viability, show that large-scale abandonment of lines is not the panacea proponents of the Act make it out to be. If, as the Wyer, Dick studies show, a 15,000 mile Penn Central system is not viable, it is hardly likely that a similar Conrail system (made up primarily of Penn Central lines) could be.

(f) *The Penn Central Trustees' viability condition concerning unnecessary employees will not be satisfied.* The Act makes no impact on the Penn Central Trustees' second condition, the elimination of unnecessary labor expense. Appellants stress the acknowledged fact that the Act provides $250 million for displaced employees, but they ignore the fact that the Act provides no means to achieve improved productivity by eliminating unnecessary employees.

The Penn Central Trustees' Report of February 15, 1972 (J. Doc. No. 4) sets a goal of eliminating approxi-

mately 9,800 train and engine service employees. Their report of July 1, 1972 (J. Doc. No. 6) states that this goal cannot be achieved except through negotiations with the affected unions on a national basis. The Act does nothing to change this situation. Indeed, the DOT Report, after observing that "one of the greatest opportunities for increasing productivity is in finding ways to change inflexible labor rules to permit better utilization of both labor and capital,"—precisely the point of the Trustees' labor condition—goes on to acknowledge that the Act "does not provide any direct mechanism for making such changes . . ." DOT Report (J. Doc. No. 62) at 8.

(g) *The Penn Central Trustees' viability condition concerning passenger service will not be satisfied.* The Act does not satisfy the Penn Central Trustees' condition of viability with respect to passenger service. While the Act may ultimately provide full compensation for passenger service, it does not satisfy the fundamental assumption of the Penn Central viability studies that the core rail system "will handle freight only and passenger operations will not constitute a burden in any way. This assumption goes beyond the concept that passenger service is self-sustaining; it assumes, in essence, that the passenger service does not exist."[42]

Furthermore, the viability studies' assumptions would require the provision of a new freight route from Boston to Washington so as to permit the exclusive use of the existing corridor for passenger service. The problems inherent in attempting to run slow-moving freight trains and increasingly high speed Metroliners over the same tracks are reflected in the RSPO recommendation that USRA:

> ". . . should consider alternate means of handling freight traffic now moving over the Northeast passenger corridor between Boston, New York City, and Washington. The Final System Plan should include and provide for the improvement of routes which would make it possible to remove as much freight traffic as possible from the corridor." RSPO Report (J. Doc. No. 63) at 3.

[42] Trustees' Report of October 1, 1972 (J. Doc. No. 7) Annex 1, ¶ III; Exhibit T-7 to Affidavit of Nelson A. Sharfman, dated March 21, 1974 (J. Doc. No. 17).



The Act makes no provision for carrying out this essential condition.

(h) *The Penn Central Trustees' viability condition concerning traffic and revenues will not be satisfied.* The final, and perhaps most vital, condition of viability postulated by the Penn Central Trustees is the achievement of the traffic and revenue potentials forecast by Temple, Barker & Sloane. (See J. Doc. No. 38; FF 12-22, JA 92-98.) The basic assumptions of the Temple, Barker & Sloane studies appear in Attachment 4 to the Trustees' Plan for Reorganization dated April 1, 1972 (J. Doc. No. 5). They include an assumption that Penn Central will have adequate plant and equipment to carry the forecast tonnage and to maintain service at or above current levels, and the assumption that there will be increased productivity from manpower, equipment and plant. (See also FF 13, JA 92-93.) The importance of these factors was recently emphasized by the Executive Vice President of Temple, Barker & Sloane thus:

> "Finally, by way of introduction, it is of critical importance to note that in our February 1974 forecast, TBS is projecting traffic that is *potentially* available to Penn Central. As was the case in our previous three forecasts, the Trustees requested that TBS assume in its latest forecast that Penn Central has sufficient plant, equipment and manpower to provide the quality of service that shippers can reasonably expect from railroads; and the present forecast is predicated on this key assumption. In

the course, however, of developing this latest forecast, evidence was obtained from shippers which now leads me to state with a reasonable degree of confidence that the current state of Penn Central's plant and equipment will render PC incapable of fully realizing the potential traffic and revenues forecast for it."[43]

As noted above, the Act does not provide a mechanism for increasing manpower productivity to satisfy the Temple, Barker & Sloane assumptions. Similarly, it does not provide nearly adequate resources for rehabilitating and modernizing Penn Central's equipment and plant, nor does it provide any funds for Conrail's working capital. The Trustees reported as early as February 1, 1973 (J. Doc. No. 9) that as much as $800 million would be required for rehabilitation and modernization. That figure has since been increased by additional deferred maintenance and inflation[44] and would be further increased by the inclusion of other bankrupt lines in the Conrail system. To meet this need the new Act provides that only $1 billion of USRA obligations be issued to Conrail, of which only $500 million must be allocated to rehabilitation and modernization. The amount is clearly inadequate for Penn Central alone upon the facts found by the Reorganization Court (JA 92). What is worse, however, any funds advanced under these provisions of the Act will apparently constitute a first lien on the Conrail properties ranking prior to the claims of the present Penn Central creditors.

It is important to reiterate that Appellants offered *no* evidence below to show that Conrail was likely to be viable, but rested upon the record submitted to the Court and on the facial terms of the Act.

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[43] Sloane affid. (J. Doc. No. 16) at 2. See also FF 22, JA 97-98.

[44] Jackman affid. (J. Doc. No. 18); FF 10 and footnote thereto, JA 91-92.



The conclusion is inevitable: immediately before the Act became law there was concededly no light at the end of the Penn Central tunnel.[45] The Reorganization Court, whose findings on such matters are customarily accorded great weight here,[46] made detailed findings which fleshed out that bare stipulation and concluded that a railroad of any configuration that could plausibly be designed from the Penn Central would not have any reasonable prospect of viability (JA 92-102) in the absence of special provisions meeting the Trustees' conditions which the Act patently fails to afford.

The introduction of Conrail does not change the situation in any material way. The addition of a few thousand miles of unprofitable track and the adoption of a hopeful new name are not enough to alter the outlook for viability. On the basis of the Act as it now stands, Conrail has no better prospects.

### 3. *The Act Provides No Assurance of Payment for the Taking by Interim Erosion.*

Congress could have provided for payment of compensation for interim erosion in at least two ways: it could have provided direct payments to subsidize the losing interim operations or it could have provided that the final payment for the rail properties compulsorily conveyed to Conrail include assured compensation for the imposed interim losses.[47] It did neither. Rather the burden of interim losses from operating Penn Central for the public purpose was left upon the estate and its creditors.

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[45] See Stip. No. 9, JA 206.

[46] See, e.g., *New Haven Inclusion Cases*, 399 U.S. 392, 463; *Reconstruction Finance Corp.* v. *Denver & R.G.W.R.R.*, 328 U.S. 495, 533.

[47] Even this procedure would have required legislative ingenuity, since the erosion is being felt system-wide, and the conveyances presumably will be less extensive.

(a) *Interim payments provided are inadequate.*

The Act does have provisions which were evidently intended to relate to interim operations. However, if in fact these were intended to provide some degree of compensation for burdens of interim operations, they are wholly inadequate.

Section 213, the only provision of the Act which provides funds which may be used for operations during the planning period, authorizes the Secretary of Transportation to make payments for certain specific purposes:

> "(a) *Emergency Assistance.*—The Secretary is authorized, pending the implementation of the final system plan, to pay to the trustees of railroads in reorganization such sums as are necessary for the continued provision of essential transportation services by such railroads. Such payments shall be made by the Secretary upon such reasonable terms and conditions as the Secretary establishes, except that recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act.
>
> (b) *Authorization for Appropriations.*—There are authorized to be appropriated to the Secretary for carrying out this section such sums as are necessary, not to exceed $85,000,000, to remain available until expended."

The $85,000,000 is plainly not enough to effect even a dent in the massive interim losses anticipated for Penn Central alone, much less for the other bankrupt lines which might comprise parts of Conrail. The Government was well aware that Section 213 money would be of no major significance. John Barnum, Under Secretary of the Department of Transportation, advised the Senate Commerce Committee that the $85,000,000 was "merely the amount



which we thought should be provided in the form of a grant to the bankrupt railroads so that they would be able to meet their payrolls Friday and not run out of cash."[48] And Counsel to the Department of Transportation conceded to the Penn Central Reorganization Court that even for the purposes intended, the $85,000,000 had been calculated on faulty premises (J. Doc. No. 25).[49]

The second provision in the Act relating to interim payments is Section 215, which provides funds for the acquisition, maintenance or improvement of rail properties to be included under the Final System Plan. However, that section provides that Conrail need not compensate a railroad for that portion of the value of rail properties transferred to it which is attributable to such acquisition, maintenance or improvement. The section thus does not so much compensate for interim erosion as it creates a charge against subsequent compensation. Moreover, the provision does nothing at all to help with the maintenance of rail properties which, though required to be kept in operation under Section 304(f), are not to be included in the Final System Plan. The section plainly does not constitute any compensation for required interim erosion.

Given the history of Penn Central losses equalling $851,000,000 for the period June 21, 1970 until December 31, 1973 and the findings of the Reorganization Court that the losses will continue unabated, the Court below had no choice but to hold that:

> "It becomes quickly apparent that the limited amounts of these funds—available to railroads in

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[48] Hearings on S. 2188 before Senate Commerce Comm., 93d Cong., 1st Sess. at 65 (Nov. 15, 1973).

[49] For a further emphatic statement that "the granting of financial assistance to protect against further erosion of the estate, is not in accordance with the purpose for which the funds under § 213 of the Act have been appropriated, see Letter of Federal Rail Administrator Ingram to the Trustee of the Central Railroad of New Jersey (Trustees' Br., Annex A, at 5a).

reorganization in the region—have not been specially designated to meet challenges of unconstitutional erosion." (JA 31)

(b) ***The Act fails to provide compensation which is adequate in medium and amount to assure fair value for the assets to be conveyed and still less does it provide redress for interim erosion.***[50]

The Act neither authorizes the Special Court to provide recompense, nor requires Conrail or USRA to make direct payment for interim erosion. The burden of such losses was specifically left with the bankrupt railroads' estates.

Appellants, however, claim that the Special Court may somehow fix the compensation to remedy erosion by including such amounts in the "constitutional minimum" to be provided under Section 303. Upon this basis they then contend that the Court below was premature and improvident in concerning itself with the adequacy of the compensatory mechanism set out in Section 303 (see, e.g., USRA Brief at 71). The problem with this approach, of course, lies in the fact that reliance on Section 303 requires rather than excuses a study of the adequacy of its compensatory mechanism. And that study in turn involves a consideration of the extent to which those procedures provide adequate assurance of compensation for the conveyed rail assets and have the clear potential of yielding values in excess of the amounts required to meet that cost, so as to defray the burdens of interim erosion. The Special Court does not have any method by which it can increase the amount of compensation available under the Act and

[50] The New Haven Trustee has cross-appealed and the Penn Central Trustees have appealed, *inter alia*, from so much of the judgment below as determined (by a 2-1 vote) that the constitutional challenges to the ultimate conveyance provisions of the Act were premature. While Appellees here have not joined in those appeals, they do concur in the arguments expressed at New Haven Trustee's Brief at 24-92 and Penn Central Trustees' Brief at 48-62.



the Final System Plan for the rail assets conveyed. If, as seems inevitable, the value of the compensation realizable under the Act turns out to be *less* than the fair value of the assets transferred to Conrail, there will obviously be no way in which the Special Court can also compensate the estate for two years' erosion. Yet that is plainly the prospect, and the Court below properly and necessarily reached the issue now.

We therefore turn to an examination of the workings of Section 303 which, Appellees submit, reveals its inadequacy both for the purpose it was ostensibly to serve and the new assignment which Appellants ask this Court to read into it.

The Act ultimately requires a non-consensual transfer of title in the rail assets from the estate of Penn Central with a simultaneous extinction of liens on those assets. At no point do any of the relevant parties—Trustees, stockholder, secured or unsecured creditors, or reorganization judge—have any option about the disposition of the property once the estate has been committed to the process of the Act. None of these propositions seems to be, nor can they be, seriously controverted.

Whether this peculiar process results in a condemnation under the eminent domain power of Congress or an exchange of assets under the bankruptcy power may be hard to discern. In either case, however, it is constitutionally indispensible that there be in the process of the Act an assurance that those whose property is transferred by virtue of its mandatory terms will be justly compensated for their losses.

Assuming that the Act is not regarded as an exercise of the power of eminent domain, Section 303 nonetheless falls far short of meeting the Fifth Amendment requirement of just compensation. The compensation payable under the Act is woefully inadequate to equal the constitutional mini-

mum value of the properties to be taken, and the Act permits Appellees no recourse by which they might recover the amount by which such minimum value exceeds the amounts payable under the Act. Still less is there any procedure by which a bill for interim erosion can be added to the claims against the compensation afforded by the Act with any hope—let alone assurance—that it could be paid. In short, the Act would take Appellees' property in the interim and ultimately, without assuring them that just compensation would be paid in all events.

(i) *Kind and amount of compensation under the Act.* The Act provides that payment for rail properties conveyed to Conrail is to consist solely of common stock of Conrail, other unspecified securities referred to in Section 206(i) (and, if Congress concurs pursuant to such section, obligations of USRA not to exceed $500 million, which might be guaranteed by the United States), and other undefined "benefits" accruing to the estate by reason of the transfer. If the Special Court should determine, pursuant to Section 303 (c), that the value of such consideration is less than the fair value of the properties conveyed, the *only* remedies allowed it by the statute are (a) an order reallocating the securities issued to the various estates; (b) an order requiring the provision of additional Conrail securities designated in the Final System Plan; and (c) an order entering a deficiency judgment against Conrail.

The common stock of Conrail can have value only insofar as Conrail will be a viable entity generating income in excess of costs and fixed charges. In light of the dismal prognosis for the bankrupt lines, parts of which will ultimately comprise Conrail, in light of the failure of the Act to deal with the problems which beset Penn Central and given the public service goals which must be served by Conrail (Section 206), the common stock will have little, if any, value. But whatever be the ultimate value of the common stock, there can be no dispute that there presently



exists sufficient doubt about that value to require consideration of the other potential sources of compensation available to the Special Court.

Securities of Conrail other than common stock and USRA obligations could possibly be included in the package of compensation to go to the estates of the bankrupt railroads. However, even if proper under the Act,[51] the addition of such securities to the Conrail mix could not solve the problem.

First, if Conrail issued debt secured by liens on all the property transferred, the mere existence of these securities would substantially decrease the intrinsic market value, if

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[51] Appellees believe, however, that the issuance of a substantial amount of Conrail secured debt to pay for the rail assets would fly in the face of the Act's design for Conrail. Debt secured by liens on the properties transferred would add nothing to the real value of Appellees' compensation unless the debt were senior and carried adequately secured fixed charges. Appellees cannot regard seriously any implication by the Government that the Act contemplated that the USRA obligations (and any other United States debt) would be junior. (Cf. Rail Act, § 211(e)(3) and (f).) Further, use of a substantial amount of Conrail debt to pay the estates would render superfluous Section 301(d), which clearly contemplates that the Government would initially control Conrail because of its debt investments therein.

Reliance on substantial Conrail debt to pay the estates would also subvert the Act's intent that the capital structure of Conrail be based on pro forma earnings (as constructed by USRA), "including such debt capitalization as shall be reasonably deemed to conform to the requirements of the public interest with respect to railroad debt securities, including the adequacy of fixed charges" (§ 206(e)). A Conrail saddled with substantial first priority secured debt could borrow only with great difficulty, if at all, a burden hardly in the public interest. Also ignored would be the Act's intent that securities issued by Conrail in exchange for the rail properties be such as "will minimize any actual or potential debt burden on [Conrail]" (§ 206(i)) and that Conrail adopt and implement employee stock ownership plans (§ 206(e) (3)), presumably using stock that has some real value after Conrail issues its securities to pay for the rail assets.

any, of the common stock.[52] Second, it must be assumed that such senior securities would carry with them rights to interest or dividends in order to be marketable;[53] however, payment of interest or dividends would result in a continual cash drain on Conrail's resources, thus further reducing the value of its common stock. Moreover, there could be no assurance that payments of interest or dividends could be made. Third, the existence of secured debt on Conrail's properties would render further borrowing by Conrail difficult and expensive, if possible at all. Last, that USRA *may* include Conrail debt securities in the Final System Plan does not supply the necessary assurance that the estate and the creditors will be paid the constitutional minimum value of the properties conveyed to Conrail, even assuming such securities could, if included, add value to the total package.

Finally, the Act provides only one remedy—a deficiency judgment against Conrail—in the event that the Special Court finds that Conrail's securities, as authorized by the Act and designated in the Final System Plan, cannot pro-

[52] If senior securities were issued to investors for cash, rather than to pay for acquired assets and interim erosion, the reverse might well be the case in that Conrail would receive funds for operations and rehabilitation of its properties, the judicious use of which could increase Conrail's earning power thus giving rise to a concomitant increase in the value of its common stock. This, unfortunately, is not the situation hypothesized here. Senior securities issued in exchange for transferred rail properties would not bring needed operating funds to Conrail, but would only increase its already difficult task of making ends meet.

[53] If the right to receive interest or dividends on the senior securities should be postponed for a period of years after their issuance, the value of such securities would have to be severely discounted for purposes of determining the "constitutional minimum." If the securities carried no rights to interest or dividends, their value would not only be greatly discounted, but they would then represent only a right to foreclose at maturity, in effect, a very expensive ticket to another Section 77 proceeding.



vide that requisite value. But the deficiency judgment must necessarily reduce the value of the common stock, the inadequacy of which requires the entry of the judgment in the first place. Thus, whether described as "essentially circuitous" (JA 77) or as a "relatively pointless" (JA 137) remedy, the Conrail deficiency judgment cannot cure the constitutional inadequacy. No party has presented any analysis which claims significant value for the judgment or which otherwise supports a contrary conclusion.

(ii) *Inadequacy of compensation on any theory of valuation.* USRA is (contingent upon subsequent Congressional ratification) authorized to provide in the Final System Plan for the issuance of up to $500 million of debt obligations of USRA, which may be guaranteed by the United States Government, for use by Conrail in paying for rail assets. Once it is appreciated that the value of the stock and other securities of Conrail is not necessarily equal to the value of the rail assets of Penn Central to be conveyed, and that the deficiency judgment is "essentially circuitous," the only remaining test of the constitutional adequacy of Section 303 is an assessment as to whether and under what circumstances this $500 million of theoretically available debt securities would provide the Penn Central estate with a total package of securities whose value would equal the constitutional minimum value of the rail properties conveyed. Appellees submit that the assessment made by the Reorganization Court in the 180-Day Decision was correct: whether the Act be regarded as an eminent domain statute or as a reorganization statute, its provisions are on their face incapable of providing compensation equal to the constitutional minimum value, whatever standard may be employed to measure that value.

The evidence before the Reorganization Court on valuation of Penn Central's rail properties consisted primarily

of a Day & Zimmermann study filed with the ICC,[54] which estimates the value as of December 31, 1970 of the physical assets of Penn Central and all its leased lines, exclusive of the Park Avenue properties, and includes, in part, land not required for rail use and railroad lines which USRA might determine should be abandoned rather than included in a Final System Plan. It is, of course, impossible to show at this time what portion of the assets studied by Day & Zimmermann would be included in a Final System Plan. It is reasonable and conservative to project, however, that in terms of the value of all physical assets of Penn Central and its leased lines studied by Day & Zimmermann, the properties designated in a Final System Plan would be likely to comprise not less than 50% of the total value of the physical assets of the Penn Central System.[55]

Two different approaches to valuation were presented by the Day & Zimmermann study, one based on a continued rail use methodology and the other based on an assumed liquidation for non-rail use. In the case of the latter methodology, a present value of a projected stream of future liquidation proceeds was also calculated. In sum-

[54] Day & Zimmermann, Inc., "The PCTC Physical Asset Valuation Study," April, 1973; Revised May 1973 as Appendix 1 to Exhibit T-21 (witness: Carlisle) in ICC Fin. Dkt. No. 26241 (J. Doc. No. 40).

[55] For example, the New Haven Trustee's Plan of Reorganization, dated June 27, 1973, submitted to and considered by the ICC in its September 28, 1973 Report, called for a reduction in route miles from some 19,000 route miles actually operated now to 11,000 route miles. The 11,000 mile "core system" would have required substantially more than half the total value of the physical assets studied by Day & Zimmermann.

Moreover, Penn Central comprises over 19,000 of the aggregate 26,000 route miles in the region potentially covered by the Act. With the Erie and Boston & Maine out of Conrail, it becomes manifestly impossible to structure Conrail without at least 50% of Penn Central.



mary, the results of the Day & Zimmermann study were as follows:

| Assumption as to "Highest and Best Use" | Total Value of Wholly-Owned Assets, Penn Central and Leased Lines as of December 31, 1970 |
|---|---|
| Continued Railroad Use ..... | $13,858,493,000 |
| Liquidation for Non-Rail Uses: | |
| Estimated Gross Proceeds of Sales over a Period of Years ..... | $ 3,532,110,000 |
| Present Value of Estimated Net Proceeds, after deducting interest factor and all expenses of sale and of preservation of assets pending sale ..... | $ 1,995,778,000[56] |

These valuations provide substantial evidence[57] upon which it may properly be concluded that even if all $500 million of USRA securities available for such use were committed to the Penn Central estate, it would not constitute payment in full for the value of the Penn Central properties likely to be included in the Conrail system; but rather that, as the Reorganization Court held, ". . . there is every reason to suppose that the included properties would be worth considerably more than $500 million" (JA 137).

[56] The present value approach results in *negative* values being assigned to certain leased lines; for example, New York Connecting R.R. has an assumed negative value of $2,898,000, after deducting $8,844,000 as the net cost of demolishing its bridges and tunnels. This is an aspect of the "scrap value" approach which is totally inconsistent with preservation of an essential national asset.

[57] In addition, Penn Central's Annual Report for 1973, prepared by Haskins & Sells, certified public accountants (Doc. No. 7813), shows, as of December 31, 1973, Penn Central's rail properties to have a book value (after depreciation and certain reserves) in excess of $2.5 billion.

The conclusion that the Act simply does not provide enough value of any kind to pay the constitutional minimum value of the conveyed rail assets alone does not at all depend upon the valuation standard applied. Both the estimated value for continued rail use ($13.5 billion) and the estimated liquidation value ($3.5 billion) clearly greatly exceed the value which could be provided by the Act's compensation mechanisms.[58] Even the Day & Zimmermann discounted scrap value approach, an approach which Appellees contend would be wholly erroneous, produces a value of approximately $1 billion on the assumption that only 50% in value of the Penn Central assets would be included in the Final System Plan.

Finally, mention should be made of a novel theory of valuation which Appellants pressed below and in the Special Court, although it does not yet appear in their briefs here. That is the proposition, unsupported by any authority, that if going concern value based upon earning capacity is *less* than liquidation value, the latter is no measure of the "constitutional minimum." As the Reorganization Court noted in the 180-Day Decision, this theory of valuation appears in the legislative history to be the basic rationale of the Rail Act:

> "The legislative history of the Act suggests that many responsible public officials may be proceeding on the assumption that the common stock of Conrail

[58] Appellees believe that if rail property is mandatorily taken by the Government for continued rail use, the required just compensation should include an incremental value in recognition of the unique and, for practical purposes, irreplaceable character of the assets when taken for continued use. See *In re Port Authority Trans-Hudson Corp.*, 20 N.Y.2d 457, 231 N.E.2d 734 (1967), *cert. denied*, 390 U.S. 1002; *In re City of New York (Fifth Avenue Coach Lines, Inc.)*, 18 N.Y.2d 212, 219 N.E.2d 410 (1966), *appeal dismissed*, 386 U.S. 778. As noted in the text, however, the proper valuation approach need not be decided here because the Act's provisions cannot pass constitutional muster under any approach.



> (i.e., the capitalized value of its prospective earnings) necessarily and automatically establishes the value of the rail assets conveyed to Conrail, even if those assets had a higher liquidation value, and even though their value for 'highest and best use' might be much greater." (JA 138)

Appellees contend that this position is wrong as a matter of law. The *New Haven Inclusion Cases* plainly held that the bondholders there were receiving a value reflecting "the highest and best use of their properties" (399 U.S. at 482, n. 80), and described that value as being the equivalent of "the right to liquidate and a per-parcel sale that is theirs by virtue of their mortgage liens" (399 U.S. at 489-90). The Court defended this value against a challenge by Penn Central predicated on the truism that it was paying liquidation value for property which had a lower (or negative) going concern value, by noting that the bondholders' right to liquidation value derived from their state-created liens (399 U.S. at 499).

*New Haven Inclusion Cases*[59] thus reinforces the proposition that liquidation is the highest and best use of the operating property of a hopelessly losing enterprise. This too stems from the investors' right to withdraw their capital from hopelessly non-remunerative use. *Brooks-Scanlon Co.* v. *Railroad Comm'n*, 251 U.S. 396. And that use then determines the value that must be reflected in any *compelled* conveyance.

Appellants' intimation below that less will suffice, and the apparent assumption of Congress in the Act that the "constitutional minimum" can be less than liquidation value is simply wrong. Of course, to the extent that Appellants seek to excuse the absence of assured liquidation values in the Act on this theory, they implicitly acknowledge

[59] See also *In re New York, N.H. & H. R.R.*, 289 F. Supp. 451, 454-55 (D. Conn. 1968).

that no *surplus* over such liquidation value is provided in the Act to defray the burden of interim erosion.

(c) *The Act fails to provide any procedures which could assure the requisite fair value for the properties conveyed and compensation for interim erosion.*

This Court has long held that the procedures set out in Section 77 are constitutional because they provide mechanisms by which "full compensatory treatment" can be accorded claimants against the estate, in order of their priority. *Consolidated Rock Products Co.* v. *Du Bois,* 312 U.S. 510, 528-30; *Group of Institutional Investors* v. *Chicago, Mil., St. P. & Pac. R.R.,* 318 U.S. 523. *Ecker* v. *Western Pac. R.R.,* 318 U.S. 448, 565-66, recognized that such treatment could not be formulistic, but depended on the existence of procedures which assured that the informed judgment of the ICC and the reorganization court would be brought to bear on "all relevant factors" in giving prior approval to any exchange of securities required by a reorganization plan.

The essence of this case law is that creditors are entitled to procedures which provide reasonable assurance that they will receive the fair equivalent of their property, in order of absolute priority, before their property may be taken from them in bankruptcy. *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555; *Wright* v. *Vinton Branch of the Mountain Trust Bank,* 300 U.S. 440; *Wright* v. *Union Central Life Ins. Co.,* 311 U.S. 273, 278. The processes of the Rail Act preclude any such assurance.

In the first place, the Special Court's Section 303 powers do not assure fair and equitable treatment. Congress provided in Section 206(d)(1) that the transfers to Conrail "shall be . . . in exchange for stock and other securities of [Conrail]." Consistent with that intent, the Special Court, which has the power to determine the fairness of the exchanges mandated by the Act, but only after they are consummated, initially decides whether the transfers



to Conrail and the exchange of securities are in the public interest and are fair and equitable to the estate of each railroad. The remedy granted to the Special Court to cure any failure of the exchange to meet the fair and equitable standard is: first, to reallocate those securities of Conrail, specified in the Final System Plan, which had been deposited with it prior to the transfer, among the various railroads; second, if the lack of fairness and equity is not thereby cured, to order Conrail to provide additional securities of Conrail or the limited obligations of USRA, if any, specified in the Final System Plan, as may be necessary; finally, "if the lack of fairness and equity cannot be *completely cured*" by these first two steps, then the Special Court "shall . . . enter a judgment against [Conrail]." Section 303(c)(2)(C). (Emphasis supplied.)

These procedures fail to assure receipt of the constitutional minimum for the obvious reason that no assurance whatsoever exists that there are sufficient assets available to the Special Court pursuant to Section 303(c) to enable it to provide a total value in the package of Conrail securities which will equal the value of the rail properties taken. Presumably, this is precisely the reason for the inclusion in Section 303(c)(2)(C) of a power to order a judgment against Conrail. Thus, while the processes of the Act necessarily contemplate a deficiency judgment, there is, as Judge Fullam's concurrence below points out, "no assurance that the price fixed by the Special Court can be paid, under the statutory scheme" (JA 79). The compensation procedures of the Act are inadequate, then, first because they are illusory.

The Special Court, moreover, is hamstrung by the Act. Unlike an ordinary reorganization court confronted by a plan of reorganization which is not feasible, the Special Court cannot refuse to order the mandated transfers and the exchange of securities required by Section 303.

The Act provides explicitly that "the Special Court *shall,* within ten days after the deposit" of the securities

called for by the Final System Plan order the Trustees of railroads in reorganization to convey "forthwith" to Conrail the rail assets specified in the Final System Plan and "shall itself order the conveyance" of lessors' interests called for by the Final System Plan. In case this explicit language of Section 303(b) did not carry clearly enough the intent to defer consideration of compensation until the conveyances had been irrevocably consummated, Section 303(c) further provides that the Special Court shall decide whether the exchanges are fair and equitable "*after* the rail properties have been conveyed to [Conrail] and profitable railroads operating in the region under subsection (b) of this section . . ." (Emphasis supplied.)

It is crystal clear from the legislative history that Congress meant exactly what it said. In the Report of the Senate Committee on Commerce on S. 2767, the Committee submitted its explanation of Section 303(b) of that bill, which itself was carried unchanged in this respect directly into the Act:

> "The conveyances are to be free and clear of liens and encumbrances and may not be judicially restrained or enjoined. . . . Because of the public interest in permitting the new Corporation [Conrail] to obtain all the rail properties it will need so that it may commence operations at the earliest practicable time, *the special court is not given any discretion in making the order requiring conveyance.*" [60] (Emphasis supplied.)

The Act further underscores the determination to forestall valuation of the assets until after they have been conveyed by its specific provision that the "conveyances shall not be restrained or enjoined by any court." Section 303(b)(2).

[60] S. Rep. No. 93-601, 93d Cong., 1st Sess., Dec. 6, 1973 at 33.



Not only are the procedures of the Act illusory, then; they are so constructed as to preclude the Special Court or any other court from interfering with the inexorable conveyances that they prescribe.[61] No court, therefore, possesses the power to scrutinize the Final System Plan in advance of conveyances and to prevent a conveyance which appears almost certain to be confiscatory. Far from assuring just compensation for interim erosion as well as the assets ultimately conveyed, the procedures of the Act go to great lengths to dissipate the assurances normally afforded by procedures under Section 77 of the Bankruptcy Act.

*The procedures under the Act are not analogous to the Section 77(e) cramdown.* The Rail Act procedures cannot be sustained by analogy to the "cramdown" provision of Section 77(e) of the Bankruptcy Act. The cramdown power is set in a context which is wholly absent in the Rail Act. Section 77 affords securityholders in a railroad reorganization the opportunity to be heard and then to vote before their property rights may be adjusted in the reorganization. This provision is consistent with the long history of legislation regarding the composition and adjustment of debts, both in England and the United States, and recognizes the safeguard of claimants' interests implicit in the consensual underpinning for railroad reorganizations.

The cramdown is designed to prevent an obstinate class of claimants from arbitrarily withholding its assent and

[61] It does not appear that Appellants press upon this Court the argument urged upon the Special Court that, notwithstanding the contrary language of its organic Act, it possesses some inherent power to make a "prima facie review" of the Final System Plan before ordering the conveyances. In any event, since the interval between delivery of the Final System Plan and the mandated transfers may be as little as eleven days, it would be impossible for the Special Court to rest any such decision upon an informed independent judgment of its fairness.

thereby frustrating a reorganization plan which is fair and equitable and in the public interest.[62] However, the cramdown is permitted only if the court finds, after hearing, that the plan makes adequate provision for fair and equitable treatment of the interests or claims of those rejecting it and that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all relevant facts.

The cramdown provision, therefore, grows out of a combination of consensual arrangement and informed judicial scrutiny in advance of the consummation of the reorganization plan. The Rail Act eliminates both of these underpinnings of the cramdown provision; it neither permits the exercise of enlightened self-interest to protect the rights of the claimants through the provision of a vote, nor allows any court the opportunity of informed judicial supervision of the terms of the exchange in advance of their occurrence.

There is no precedent for compelling such exchanges in the absence of both assent and prior judicial determination that they are fair and equitable.

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[62] It is improbable that the cramdown power is intended to be available where, as here, there is general objection to the plan by all classes of claimants. As the leading commentator puts it:

> "[T]heoretically the judge may confirm a plan where no classes at all have assented to it . . . .
>
> • • •
>
> The language [of § 77(e)] is broad enough to permit this. But aside from questions as to constitutionality, it is difficult to conceive of a plan being 'fair and equitable' . . . which is disapproved by all the classes. Such disapproval would in itself forcefully indicate that that judge confirming such a plan was wrong in determining the commercial expediency of the plan, which the classes are usually better qualified to determine than the judge . . . . There seems little doubt that the provision will be applied only to small, obstructing, dissenting groups after most of the other classes have indicated their approval of the plan." 5 Collier, *Bankruptcy* § 77.19 at 555 and n.10 (14th ed. 1974).



### D. *New Haven Inclusion Cases*, 399 U.S. 392, Does Not Support the Constitutionality of the Rail Act, but Exposes its Unconstitutionality.

Appellants and *Amici Curiae* all confirm the understanding derived from the legislative history that the Act is consciously based on the New Haven reorganization and allegedly draws constitutional support from the decisions handed down in its course. Appellees here defer to the New Haven Trustee's review of the relevant history of that proceeding which, we are informed, he will present in his Appellee's brief. In view of the emphasis placed upon the New Haven precedent, however, Appellees here do emphasize certain particulars which demonstrate that the defenders of the Rail Act are misguided in the comfort they draw from that proceeding:

In *New Haven*, the rail properties of the debtor were conveyed to the newly merged Penn Central, a corporate colossus having assets with a value more than twenty times the value of the acquired New Haven properties. The size of Penn Central, the corporate history of its components, and the economic prospects for the merged company as developed in the long Penn Central merger proceeding, all led to a confidence that the underwritten value of the stock of Penn Central would furnish fair intrinsic value, especially when taken together with the conditions and protections ordered in advance by the reorganization court. Even so, when it became apparent (because of the filing of the Penn Central reorganization petition) that there was doubt about the value of the Penn Central stock, this Court remanded the matter to the District Court observing that:

> "The fairness and equity that are the essence of a § 77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value." *New Haven Inclusion Cases*, 399 U.S. 392, 488; and compare generally *Id.* at 483-89.

Here, by contrast, there is no pre-existing corporate entity to which the rail properties of Penn Central can be conveyed; rather, the conveyed assets *are* the totality of operating assets of Conrail and the prospective earning power of Conrail turns entirely on its capacity to wring a profit from those bankrupt lines. There does not exist behind the Conrail stock even the measure of assurance, forlorn as it turned out to be, that underwrote the value of the Penn Central common stock delivered to the New Haven. No court under the Act may circumscribe with conditions the compensation to be afforded the Penn Central estate under its terms and no court, not even this one, has the power to do what this Court did in the *New Haven* case, namely, remit the cause for reconsideration in light of doubt about the intrinsic value of the securities constituting consideration for the conveyed rail properties.

In *New Haven*, the "light at the end of the tunnel" at all times was thought by all parties involved to be real; here, excepting only the Government and USRA, all parties —including the Trustees, secured creditors, unsecured creditors and the stockholder—agree that the hope of reorganization afforded by the Act upon its own terms is ephemeral.

In *New Haven*, all the parties agreed that, from the point of view of the estate, continued operation until the inclusion was accomplished was better than liquidation. Here Appellees and the Trustees, creditors and the stockholder have strenuously opposed the indeterminate continuation of loss operations required by the Act until the Final System Plan emerges and Conrail is born.

In *New Haven*, the bondholders, motivated by the considerations mentioned just above, consented to inclusion by a substantial majority and then bided their time. Here the consents of Appellees have not been solicited and the Act affords them no opportunity to register their vigorous



opposition in any operative way. They have, however, protested, by every means available, the otherwise inexorable processes of the Act, in this action, by a motion to terminate rail operations and by pressing their objections to the Act and its processes in the proceedings required by Section 207(b) of the Act. This general rising against the impositions of the Act, further illustrated by the companion appeals before this Court, is clearly not the cavil of an obstructionist minority. It is also a far cry from the position taken by the majority of private interests in the *New Haven* case.

In *New Haven*, the reorganization court had continuous surveillance of the reorganization effort to be effected by inclusion in the Penn Central merger so that:

> (a) It could and did pass upon the plan of reorganization and the proposed inclusion; the Reorganization Court under the Act would have no such power.
>
> (b) It could and did pass upon, modify, and ultimately determine the value for which the New Haven assets would be conveyed to the merged Penn Central, in which capacity it reviewed the elaborate record of two separate ICC valuation proceedings; the Reorganization Court under the Act would have no such power.
>
> (c) It could and did pass upon the feasibility and continued vitality of the inclusion as time passed from its first proposal to the event of its consummation; the Reorganization Court under the Act would have no such power.
>
> (d) It could and did determine that if inclusion were not effected by a date certain (December 31, 1968), it would have been unreasonably delayed and, notwithstanding its once bright hope, the New Haven would be shut down; the Reorganization Court under the Act would have no such power.

In short, at each step of the way the New Haven court had decisive control of the estate which was *in custodia legis* before it. The Rail Act ousts the Reorganization Court here of that power, denies the Special Court comparable powers and strips Appellees of the protection that such powers would afford.

It is not irrelevant to note that, despite these significant differences, including the vastly superior prospect of success, the substantial approbation of the private interests, the scrutiny of the ICC and the surveillance of the court, the New Haven inclusion in Penn Central turned out to be an unmitigated disaster. If, as Appellees contend, a reasonably likely prospect of feasible reorganization is required as the constitutional predicate for continued loss operations, the New Haven experience, fraught with distinctions and cataclysmic in result, hardly provides a basis for optimism here.

• • •

The Act, therefore, contains neither an assurance of just compensation or fair value for rail assets to be conveyed, nor the financial components necessary to provide such assurance, nor mechanisms—judicial or consensual—to protect the estate from loss of its property in the absence of such assurance. These shortcomings not only affect the compensation which may come due for the ultimate conveyances but also preclude the prospect of compensation for interim erosion. They are failures of constitutional magnitude which the Court below was right to declare as such and to enjoin.



## II.

### There is No Adequate Remedy at Law Available to Appellees under the Tucker Act.

Appellants urge this Court to hold that the Tucker Act [63] provides an adequate remedy at law for the perceived constitutional inadequacies of the Rail Act and, upon that ground, to vacate the injunctions issued below.[64]

The same Appellants have also conceded, however, that in the absence of a Tucker Act remedy a serious constitutional issue does indeed exist with regard to the propriety of the Act.[65]

Preliminarily, Appellees contend that one of the grounds of decision employed by this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, to reject precisely the same contention when urged by the Government there is equally applicable here. In addition to deciding that there was substantial doubt as to whether a taking by the

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[63] The Tucker Act provides in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

[64] Even if the Tucker Act were an adequate remedy at law, it is apparent that the declaratory relief afforded below should not be set aside on that ground. Fed.R.Civ. P. 57 specifically provides that "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Here, such declaratory relief is plainly appropriate, if Appellees are right on the merits, if for no other reason than to foreclose subsequent quarrels in the Court of Claims over whether there were in fact constitutional wrongs done them. See *Altvater* v. *Freeman*, 319 U.S. 359; *Delaney* v. *Carter Oil Co.*, 174 F.2d 314, 317 (10th Cir. 1949), *cert. denied*, 338 U.S. 824.

[65] See, e.g., USRA Br. at 40; Trustees' Br. at 30.

President, which was unauthorized by the Congress, could form the basis of a claim under the Tucker Act, the Court noted that the "seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement." *Id.* at 585. Viewing the case that way, and in the light of the facts presented below, enormous difficulties are readily foreseeable in identifying and measuring the damages that could be inflicted upon Appellees by the compulsory interim operations mandated by Section 304(f) and the complicated set of conveyances ultimately contemplated by Section 303.[66]

Nor does the fact that in *Youngstown* the President had ordered direct Government operation of the steel mills materially change the complexity and dimension of these problems. The compulsory operation, for an indeterminate period even by existing managements, for a public purpose and under force of law, generated in *Youngstown* and would generate here difficulties of damage assessment of the kind that, in part, motivated this Court to disregard the Tucker Act as a plausible remedy in *Youngstown*.

Moreover, an analysis of the Act and its legislative history makes clear that, even apart from these practical considerations, the option of a Tucker Act remedy does not in fact exist. It is plain from such a review that the Act creates procedures which: (a) are intended to exhaust the claims upon which a Tucker Act remedy could hypothetically be sought; (b) are intended to vest in the Special Court exclusive jurisdiction with respect to compensation for the amount constitutionally owed the bankrupt estates;

[66] Among these problems are, for example, the marshalling of divisional mortgages in relation to properties operated and the respective profitability of the several parts of the system, as well as the distribution of proceeds upon ultimate conveyance; the proper distribution of the burden and the "benefit" of labor protection under the Act; and, of course, the calculus of erosion which has already produced a considerable literature in this case.



and (c) accurately reflect the explicit Congressional intention that claimants against the estates of railroads in reorganization be denied recourse to the United States Treasury for any deficiencies in compensation under the mechanics of the Act.

**A. The Statutory Scheme of the Act on Its Face Purports to be Exclusive and Exhaustive.**

The provisions of the Act comprise a self-contained structure for the adoption of the Final System Plan which determines the properties to be transferred to Conrail and the manner and measure of payment to be afforded in exchange. This process by its terms is exclusive, preemptive and exhaustive of any cause of action against the United States.

The Act clearly sets up a preemptive system of judicial participation with respect to the Final System Plan. Section 209 mandates the empanelling of the Special Court and the consolidation before it of "all judicial proceedings with respect to the final system plan." Section 303(c) endows the Special Court with the duty to review the consideration to be received for the properties conveyed and ultimately the authority to enter a deficiency judgment against Conrail. The exclusive appeal from the Special Court's findings is provided for in Section 303(d).[67]

[67] Section 303(d) provides that:

"A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: Provided, *That such appeal is exclusive* and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss." (Emphasis added.)

The very nature of the mode of exchange set out in the Act reinforces the conclusion that Congress legislated what it believes to be an exclusive method for both measuring and satisfying Appellees' rights to just compensation for their property transferred to Conrail. Congress provided in Section 206(d)(1) that the transfers to Conrail "shall be . . . in exchange for stock and other securities of [Conrail]." Consistent with that intent, the Special Court, which has the power to determine the fairness of the exchanges mandated by USRA, decides, after the fact, whether the transfers to Conrail and the exchange of securities are in the public interest and are fair and equitable to the estate of each railroad. The remedy granted to the Special Court to cure any failure of the exchange to meet the fair and equitable standard is: first, to reallocate among the various railroads those securities of Conrail which had been deposited with it prior to the transfers; second, if the lack of fairness and equity is not thereby cured, to order Conrail to provide additional securities of Conrail or the limited obligations of USRA, specified in the Final System Plan, as may be necessary; and finally, "if the lack of fairness and equity cannot be completely cured" by these first two steps, then the Special Court "shall . . . enter a judgment against [Conrail]" (Section 303(c)(2)(C)). In Section 303 (c)(3), the Act prescribes the applicable standard of completeness to be "the constitutional minimum standard of fairness and equity."

Congress clearly determined, then, that the deficiency judgment against Conrail—which, under Section 209, only the Special Court has subject matter jurisdiction to render —was to be the means by which any shortfall below the "constitutional minimum" was to be "completely cured." Of course, if the deficiency judgment is intended to be the *complete cure* of such a constitutional deficiency it must by that fact have been intended to extinguish the claim for such a shortfall which is said to be available in the Court of Claims. There simply is no room for inference from the



statutory scheme that any recourse was left to the public coffers.

The *Amicus Curiae* Brief submitted herein by thirty-seven members of the House of Representatives (including the principal authors and managers of the Act on the House side) makes clear, if it was not already clear, the legislative intent underlying passage of the Act. The Brief states in pertinent part (pp. 17-22):

> "The Tucker Act, 28 U.S.C. 1491 (1970), waiver of the sovereign's jurisdictional immunity was enacted to provide adequate opportunity for expeditious and orderly determination of claims against the government. The Tucker Act deals with the five limited areas of liability to which the government consents. The five areas do not purport to deal with the upholding of other Acts of Congress. This Court has never relied upon the presence of the Tucker Act to uphold the constitutionality of another Act of Congress.
>
> "The logic employed in attempting to argue that the Rail Act is constitutional because of a potential Tucker Act remedy is indeed strained. Each and every act of Congress of a similar nature, irrespective of the amount of authorization or the process provided for in any such act, could be constitutionally upheld on the grounds that a future Tucker Act remedy might be invoked. The intent of Congress in passing the Tucker Act was not to insure the constitutionality of potential unconstitutional laws and such a precedent would be very dangerous.
>
> • • •
>
> ". . . there is no question that in considering the process under this Act the 93rd Congress, specifically the House of Representatives, rejected giving the Federal Courts the key to the Treasury which

would result from an open-ended deficiency judgment against the United States. The legislative history of this Act is emphatic in restricting the total amount of funds to be used in carrying out the reorganization process authorized by the Act.

* * *

"If this Court should decide at this time that a mechanism of a deficiency judgment against the United States under the Tucker Act is necessary to make this Act constitutional, the the [sic] Act must fall since the legislative history and the language of the Act are clear that no deficiency judgment against the U.S. is authorized by the Act."

As Congress envisioned it, then, only the Special Court is to review the exchange of securities for rail properties, and as to its functions its jurisdiction was plainly intended to be exclusive. No other agency, court or entity, including the Court of Claims, was given such authority.

As a practical matter (questions of the adequacy of the consideration apart), it makes some sense to vest the Special Court with such an exclusive and preclusive role. That Court, in determining the fairness of the consideration, must allocate the securities of Conrail among the various estates of the bankrupt railroads. This allocation obviously can only be made by a court competent to ascertain the values of all the properties transferred by the various railroads pursuant to the Final System Plan. It is impossible to believe that Congress went to such great pains to create this new tribunal and endow it with the special and unique function of allocating Conrail securities among the various railroads, and at the same time contemplated that the estates of the railroads should undergo still another, duplicate proceeding in the Court of Claims to supplement the inadequate consideration awarded by the Special Court.



As Appellants contend, there is no doubt that Congress thought that the consideration available under the terms of the Act would be sufficient to afford a "constitutional minimum." It is equally certain that Congress explicitly intended not to open the doors of the Treasury either by the terms of the Act or under any other statute should the compensation provisions of the Act be found unconstitutional. It simply does not follow that because Congress had hoped that the Act by its own terms would be constitutional, this Court can exercise legislative creativity to adopt a construction of the Act, which actually amounts to the antithesis of the Congressional intent, all to save the Act from its unconstitutionality.

**B. The Legislative History is Consistent Only With the Exclusion of a Remedy in the Court of Claims.**

The entire history of the Act is instinct with the Congressional intent not to afford the bankrupt estates or their creditors recourse to the federal treasury in the event the compensation provided under the Act proved constitutionally inadequate. Appellants have suggested (USRA Br. at 17, 58) that, in contesting the existence of a Tucker Act remedy upon such a reading of the legislative intent as above described, Appellees are imputing to Congress a willful constitutional violation. Appellees need not and do not attribute any such heinous intent to Congress. Appellees merely take the Congress at its word: if the procedures of the Act are inadequate on their own terms to provide constitutional compensation to the estate, then Congress wishes another opportunity to examine the entire question in order to determine the nature and amount of any federal investment that should be made in the revitalization of the region's railroads.[88]

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[88] Indeed, Appellees have some difficulty with the position adopted here by the Government, in face of so explicit a legislative understanding as we shall presently review. That position essentially involves the Executive Branch in an effort to elicit from the Judiciary a construction of the Act manifestly at odds with the intent and expectation of the Legislative Branch.

This intent is evident from a review of the Act as it went through the drafting process, from the various Committee reports dealing with it, from the floor debates, most particularly including the specific explanations of its managers in both Houses, and finally from the retrospective view afforded by oversight hearings and the *Amicus* Brief.

To begin with, Congress fashioned the Act in the model of a Section 77 reorganization for the purpose of avoiding judicial characterization of the Act's processes as a "taking." The reason for the use of a reorganization construct is apparent throughout the legislative history. Congress wanted to cure the Northeast rail crisis "at the lowest possible cost to the general taxpayer." Section 101(b)(6). In order to avoid Fifth Amendment claims for just compensation by the estates of the bankrupt railroads, the drafters imported language, such as the phrase "fair and equitable," from Section 77, and excised language from early drafts of the Act requiring "mandatory consolidations of all properties of bankrupt railroads."[69] For example, the substitute provision in House Bill 9142 articulates the first goal of the Final System Plan as follows:

> "Section 303(a). The final system plan shall be formulated in the light of the following goals—(1) the objective of creating, ***through a process of reorganization***, a financially self-sustaining rail service system. . . ." (Emphasis supplied.)

Similarly, the final version of the Act which emerged from the Conference Committee contained fourteen separate references to the Act as a "reorganization." The language of Section 207 and the history underlying the drafting of it is all to the effect that Congress tried to create in Section 207 a constitutionally adequate procedure comparable to the Section 77 judicial options.

[69] Section 303(a) of the Subcommittee Print—H.R. 9142, dated August 2, 1973 with Changes Proposed by Messrs. Shoup and Adams.



Congress persistently refused throughout the legislative process to make the full faith and credit of the United States available to guarantee or underwrite Conrail securities or the deficiency judgment or otherwise to open the Treasury directly or indirectly. One striking example lies in the comparison of the report of the Senate Commerce Committee on S. 2767, the Senate version of the bill (S. Rep. No. 93-601, 93d Cong., 1st Sess., Dec. 6, 1973), and the final conference report on the bill as passed. In the former, the Senate Commerce Committee, in explaining Section 206(i), which provided that the Final System Plan might include terms and conditions for securities to be issued by what has become Conrail, stated that, "Some form of Federal guarantee of the value of the Corporation stock may be one such arrangement which the planners may consider." *Id.* at 28. The report went on to note that no such guarantee could become effective without affirmative joint resolution of Congress. Even as so limited, however, the Conference Committee ruled out such a possibility and the eventual bill was explicitly intended to exclude even the possibility of such a guarantee of Conrail stock. The conference report specifically states:

> "The conferees agreed that the arrangements recommended by the planners under Section 206(i) shall not include any form of Federal guarantee of the value of the Corporation stock."[70]

The conferees thus returned to a position which had been consistently expressed by prior committee reports. See, e.g., Explanation of Legislation Pertaining to the Midwest and Northeast Rail Crisis, Senate Commerce Comm., 93d Cong., 1st Sess. (Nov. 15, 1973) at 17 where it is observed

[70] H. R. Rep. No. 93-744, 93d Cong., 1st Sess. 56 (Dec. 20, 1973).

that "The limitations on the amount of obligations Fannie Rae [now USRA] is allowed to issue *would determine what the maximum exposure of the Federal Government would be.*" (Emphasis added.)

That Congress passed the Act in this form and upon this understanding is made clearer still by study of the debates.

The debates in both the House and the Senate are replete with explanations of the scheme of the Act as providing non-governmental compensation to the estates of the bankrupt railroads thus saving the American taxpayers from paying billions in just compensation to the estates. Perhaps the most important of these exchanges occurred during the discussion on the conference report accompanying H.R. 9142 in a colloquy between two of the "Managers on the Part of the House" on December 20, 1973:

> "Mr. Kuykendall. Mr. Speaker, I would like to ask the gentleman from Washington one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal Court had the key to the Treasury.
>
> "Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?
>
> "Mr. Adams. Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress, to be signed by the President. . . . [I]t was the clear intent of the managers that any amount other than common stock [of Conrail] was to be at the lowest possible limit to meet the constitutional guarantees.
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> • • •



> "Mr. Kuykendall. There is no way the Federal Court may assess the taxpayers or this Congress on the judgments of the creditors, is that correct?
>
> "Mr. Adams. The gentleman is correct.
>
> "Mr. Kuykendall. There is no way they can assess the Congress for the money?
>
> "Mr. Adams. The gentleman is correct." [71]

The *Amicus* Brief (pp. 21, 1a-3a) filed by, among others, those who spoke the words, clearly believes the Court below correctly caught their meaning (JA 49-50). Also illustrative is a statement made by the co-drafter of the House Bill, H.R. 9142, Congressman Adams:

> ". . . we have done everything possible in the legislative history surrounding this bill to make certain that no more than the constitutional minimum for liquidation as defined by the Supreme Court will be paid by the new corporation for the properties obtained from the bankrupt estates. In addition, we have limited the amount of Government loan guarantees that can be used for acquisition so that taxpayers are protected both by legislative history guided by the determination of the Court and by an absolute limit on the amount of Government guaranteed loans that can be used.
>
> • • •
>
> ". . . There is a specific limitation in the final bill which says no more than $200 million of Government loan guarantees can be used for acquisition in any event, so if the court in 5 to 10 years should come in with a higher value, the only judgment would be against this new corporation [Conrail] that is there." [72]

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[71] 119 Cong. Rec. H11876 (daily ed. Dec. 20, 1973).

[72] 119 Cong. Rec. H9732, 9742 (daily ed. Nov. 8, 1973).

Congressman Metcalfe, a member of the Transportation and Aeronautics Subcommittee which reported the bill to the House Committee on Interstate and Foreign Commerce, speaking on behalf of the bill, stated that:

> ". . . I think that those who look upon this as a 'billion dollar bonanza' are using terms which are misleading to the American people. Title VI of the bill is concerned with financial arrangements and obligations of the association. Under this section the Federal Government will guarantee obligations of the association up to $1 billion. This will not be at any cost to the Federal Government. Under this title the Federal Government is guaranteeing loans, not granting subsidies."[73]

Moments later, Congressman Shoup, a co-author of H.R. 9142, observed that the Special Court would have to either enter a deficiency judgment against Conrail itself "or require that the assets be returned to the bankrupt railroad."[74]

On the same occasion, Congressman Conte, espousing the purported virtues of the Act, explained that it rationalizes the railroads "within the private sector. It calls for no great and continuing influx of Federal funds."[75]

Consistent with the remarks made in the House, when asked by Senator Beall to "describe the total amounts of money involved" in the process of the Rail Act, the manager of the Senate bill, Senator Hartke, listed only the authorization on the face of the Act for grants, debt guarantees and labor protection.[76] Indeed, Senator Hartke went on to express the view that a Court of Claims case might be created by *not* passing the Rail Act.[77]

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[73] 119 Cong. Rec. H9741 (daily ed. Nov. 8, 1973).

[74] 119 Cong. Rec. H9742 (daily ed. Nov. 8, 1973).

[75] 119 Cong. Rec. H9746 (daily ed. Nov. 8, 1973).

[76] 119 Cong. Rec. S23777-78 (daily ed. Dec. 21, 1973).

[77] 119 Cong. Rec. S23783-84 (daily ed. Dec. 21, 1973).



It is significant that nowhere is there a single comment either in the House or the Senate evidencing intent to appropriate additional funds should the Act's provisions prove to be insufficient.

After argument below, Oversight Hearings were held by the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce to inquire into the Tucker Act position argued below by USRA and the Government, and to make it clearer still that recourse to the Treasury via the Court of Claims was not intended by Congress. In these hearings, Congressman Dingell chastised Appellants for taking the legal position below that a Tucker Act remedy is available:

> ". . . I believe the actions of the Department of Transportation and the Department of Justice, as of this point, are in the gravest error and constitute a clear misconstruction of the intentions of the Congress with regard to the Northeast Rail legislation and constitute what may properly even be charged as a potential throwaway, or giveaway of millions or perhaps even billions of dollars of the taxpayers' money in the clearest defiance of the express intent of the Congress as set forth in the reports, the debate and in the clear language of the legislation, which we are presently scrutinizing in this gathering here today. (pp. 253-4)
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> • • •
>
> "I wish to reiterate my outrage in the situation which I see going on before us. I wish to state that, it is, again, in my view, the clearest and most extraordinary defiance of the clearly expressed intention of the Congress with the portent of perhaps millions or perhaps even billions of dollars of taxpayers' money being dissipated to persons who have no proper and rightful claim on it, either under the Constitution or the law.

"I think, for the Department of Justice, or the Department of Transportation to engage in the kind of brief that I have seen here before us today, essentially agreeing with the rape of the public Treasury, is a scandal of the greatest dimension, and I think it may necessarily fall upon this committee or one of our subcommittees to look into and to inquire into why this kind of extraordinary action has been taken in terms of a total and clear misconstruction of the attitude of the Congress and the intention of the Congress when we passed the legislation." (pp. 254-55)

Congressman Dingell continued, quoting from a memorandum prepared for the Committee by the Library of Congress:

". . . 'It should be noted that any claim which is granted by the court of claims must be paid by appropriated funds of the United States. The testimony sets the potential value of the rail properties of the Penn Central at as much as $12 billion to $14 billion.'

"That is the potential liability of the taxpayers here. That is, if this matter is not handled with great care by the Attorney General and the Executive Departments, 'the scrap or salvage value alone is estimated to be at least $2 billion. Such enormous potential expense would certainly have been brought to the attention of the Congress at the time of the passage of the Act, but the statement of the floor managers of the Act in the House and Senate contained no such mention.'

• • •

"But I want to make it plain that the floor managers, and, Mr. Adams, Mr. Kuykendall and Mr. Staggers over in the House and other Members, the language of the bill the Report clearly indicated there was no intention of imposing this kind of contingent liability upon the people with enactment of the Northeast legislation." (pp. 290-91).



Congressman Kuykendall, joining in the expression of dismay over the position advanced below on the Tucker Act, and, quoting his exchange with Congressman Adams during debate, emphasized his belief that the colloquy represented what the Committee promised the Congress of the United States as to the availability of further call on federal funds by virtue of the Act. And he reiterated that, if the compensation provisions of the Act were unconstitutional, "then, we will go back to the drawing board, if necessary." *Id.* at 252.

On the same occasion, Congressman Skubitz adopted and read into the record a portion of the Library of Congress memorandum which, after quoting the Conference Report passage quoted *supra* at 91, went on to say (*Id.* at 284-85):

"It hardly appears reasonable that the Congressional managers of the Act would so explicitly exclude the possibility of a Federal guarantee of the value of Con-Rail stock if a similar guarantee were available through the back door by means of the Tucker Act.

"It is a far more reasonable conclusion that the Congress intended to preclude all Federal guarantees regardless of their source. In short, the creditors may pursue the assets securing their liens insofar as possible. They cannot, however, assert them on the Federal Treasury."

In short, the House Committee from which the Rail Act originally emerged has gone to extraordinary lengths to repudiate any attribution to Congress of an intention to leave open any recourse to the Treasury under the Tucker Act.

**C. In Light of the History and Language of the Rail Act, the Tucker Act "Remedy" Cannot Be Adequate.**

Given this clear Congressional instruction, it is improvident to assume, as Appellants do, that Congress would appropriate funds to pay a Tucker Act claim when in the first instance Congress refused to authorize such funds after full consideration of the financial aspects of the rail crisis. The probable result of the operation of the Act, if allowed to proceed to fruition, is another crisis (and perhaps another Section 77 proceeding) caused by Conrail's inability to pay the deficiency judgment against it.[78] If such a crisis should come to pass, Congress, upon returning "to the drawing board," might choose a variety of remedies—an obvious one being withdrawal of consent to be sued in the Court of Claims and enactment of yet another legislative attempt to keep the rails running and again to "assure" creditors of that "constitutional minimum standard of fairness and equity." Section 303(c)(3). This round would, of course, find Appellees as unsecured judgment creditors and shareholders, years down the road, having suffered further erosion of the assets potentially available to satisfy claims.

One can only assume that Congress will not be any more willing to compensate Appellees for their losses should the Court of Claims enter a judgment than it was when it considered and rejected such compensation in enacting the Act. Appellants are asking this Court to reach a wholly speculative conclusion that Congress, rather than choosing other, less onerous remedies, would drain the Treasury to pay a judgment of hundreds of millions or billions of dollars which would have been entered in the first instance, by the terms of its own Act, against a private entity, Conrail.

[78] Of course, the Tucker Act remedy is required only at the point that the Conrail judgment is returned unsatisfied, an event that itself presupposes the insolvency of Conrail.



Such a judgment is unprecedented in the history of the Court of Claims[79] and even if such a judgment be entered, Congress could refuse to appropriate the funds to meet such a judgment.[80] *Glidden Co.* v. *Zdanok*, 370 U.S. 530, relied on by Appellant USRA (USRA Br. at 60), does not indicate a contrary result. Examining whether the Court of Claims was an Article III court so that its judges could properly sit on the benches of other federal courts, this Court held that the functions of the Court of Claims were sufficiently judicial in nature to bring its jurisdiction within Article III. One aspect which the Court singled out in its opinion for special treatment was the Court of Claims' lack of enforcement power for claims in excess of $100,000. While the Court noted that Congress had refused to pay a Court of Claims judgment against the United States 15 times in 70 years, it nevertheless held that the judicial power of the Court of Claims was not so severely impaired as to place it outside the ambit of Article III. The holding of *Glidden* does not stand for the proposition that the Court of Claims may enforce its own judgments, or that Congress

[79] A review of the annual reports of the Clerk of the Court of Claims indicates that the largest judgment ever rendered by that Court amounted to $31,761,207.57, exclusive of interest. This judgment was actually four judgments rendered in consolidated cases and rendered pursuant to joint motion and stipulation as to the amount. *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433 (1950). Broken down, the judgments were $24,296,127; $6,037,567.72; $623,686.18; and $803,826.48. The actions were brought pursuant to a special statute, Act of June 28, 1938, 52 Stat. 1209, 75th Cong., 3d Sess., as amended, which gave the Court of Claims jurisdiction to render judgment against the United States arising out of, *inter alia*, the ceding of Indian lands to the United States pursuant to a federal statute passed in 1880. The Government's liability was established in 100 Ct. Cl. 413 (1943). A related decision as to valuation standards and other matters appears at 112 Ct. Cl. 123 (1948). The $31,761,207.57 was appropriated by Congress in the Supplemental Appropriation Act of September 27, 1950, 64 Stat. 1044, 1064, 81st Cong., 2d Sess.

[80] 31 U.S.C. §724a; 28 U.S.C. § 2518.

may not refuse to appropriate funds to pay a judgment of that court when it so chooses,[81] or that demonstrated Congressional resistance to any such appropriation may not be considered, in a proper case, on the issue of whether the Tucker Act remedy is sufficiently certain to be "adequate."[82]

Congress having explicitly made the Treasury immune to recourse under the Act, this Court should not assume that Congress would turn full circle to afford funds which it quite consciously refused to provide in the operation of the Act. The Court below found that the Act was designed as a self-contained mechanism for the complete effectuation of the Final System Plan without resort to the Court of Claims.

> "For this court to interpret the Act in a manner contrary to its explicit terms, contrary to the express representations of the bill's managers at the conference committee discussions, and to construe this Act in a manner which will expose the United States Treasury to presently incalculable, but, in any event, substantially formidable claims would be a flagrant violation of the separation of powers doctrine. If

[81] Indeed, Article I, Section 9, Clause 7 of the Constitution plainly reserves to Congress the power to appropriate and requires such a step as a prerequisite to payment of federal funds. The unremitting Congressional hostility to the use of that power in this situation simply cannot be ignored in appraising the likelihood of Appellees' achieving monetary redress of their constitutional grievances.

[82] *Hurley* v. *Kincaid*, 285 U.S. 95, also relied on by Appellant USRA (Br. at 41, 45, 69), is also not controlling. There all parties conceded that, if flooding of plaintiff's property occurred, a condemnation pursuant to a valid statute would have taken place. Here no such recognition exists, either as to the validity of the Rail Act, or as to the legal characterization of its consequences as a taking. The multifold complexity in damage calculations noted in *Youngstown, supra*, also sets this case apart from *Hurley*'s very simple set of facts.



> we did this, the judiciary would truly have become the 'law-giver' for substantial federal appropriations; this in itself would raise serious constitutional problems.
>
> "To accept the government defendants' contention would require judicial legislation on a grand, if not arrogant, scale. Justice Holmes told us 'I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.' [*Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221 (Holmes, J., dissenting)]. To read a Tucker Act remedy into the Act would be a movement of the mass and not simply the particles. We simply lack such power." (JA 52-53)

In this view, Appellees submit, the District Court was eminently correct.

Appellees contend, therefore, that the Tucker Act is clearly unavailable. But even *uncertainty* about the availability of the remedy defeats it as "an adequate remedy at law." *American Life Ins. Co.* v. *Stewart*, 300 U.S. 203, 214-15; *Davis* v. *Wakelee*, 156 U.S. 680, 688. See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585; *Bohler* v. *Callaway*, 267 U.S. 479, 488; *Union Pac. R.R.* v. *Board of County Comm'rs*, 247 U.S. 282, 285-86.

It is illusory to expect the Tucker Act to afford final refuge for Appellees, either under the Act, or under any rationally foreseeable set of circumstances in which it might become necessary. Accordingly, there was no adequate remedy available to Appellees to redress the wrongs threatened by the Act that could have justified the Court below in withholding injunctive relief.

## III.

**Injunctive Relief Granted Below was Timely and Proper.**

In addition to their substantive quarrels with the District Court decision below, Appellants challenge the injunction issued on the ground that it was premature and extravagant in its scope. It was neither.

Appellants' contention that the injunction was premature derives almost entirely from their perception of the merits of the case. Thus they argue that since no unconstitutional erosion is visited by the Act upon the estate of Penn Central, it is untimely to enjoin the provisions of the Act which command its continued operations (see, e.g., USRA Br. at 62-63). Such substantive contentions have already been addressed.

If the Court below was correct on the merits in perceiving imminent constitutional harm to Appellees, then no valid separate argument exists that the Court below should have postponed granting relief. The argument based on timeliness, then, rises or falls with the arguments on the merits and is not truly an independent objection to the Court's order.

The propriety of the order, both as to timeliness and scope, is further demonstrated by the fact that, pursuant to the terms of the Act, the Court below could not have postponed such relief, even if it had so desired. Once the provisions of the Act embrace the estate of a railroad in reorganization, a network of provisions in the Act effectively preclude any subsequent judicial intervention to halt or deflect its inexorable processes. Upon finding those processes involved a constitutional wrong to Appellees, there was no later point in the course of the Act at which the District Court could have afforded the relief it granted below.



Indeed, it is the design and effect of the Rail Act that the federal judiciary be excluded from any such role, and the Act in this respect is at least thorough.

The several decretal paragraphs of the injunction issued below all reflect sensitivity to the ouster of the federal courts from subsequent opportunities to grant similar relief and are thoroughly justifiable as to timeliness and reach, separately and together, in light of that pervasive exclusionary effect.

Section 304(f) of the Act, as we have already pointed out, specifically commands continued operations notwithstanding any decision of any federal court. That provision effectively prevents the Reorganization Court, or any other court, from fixing, at some later date, when the issue is thought to be more mature, a point of unconstitutional erosion requiring abandonment, cessation or reduction of services. The injunction below merely excises that prohibition; it enjoins the defendants from taking any action to enforce the provisions of Section 304(f) "with respect to any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution." (JA 82)

The problem with the argument put, for example, by USRA (USRA Br. at 64-68) that the injunction adds nothnig to the existing power of reorganization courts to order such service reductions is that it disregards the explicit contrary language of the statute. The injunction below preserves that option to the reorganization courts where the Act would foreclose it. Since interim operations have been compulsory under the Act since January 2, 1974, and since there were pending before the Penn Central Reorganization Court petitions and motions directed to the reduction or termination of service on constitutional grounds, it can hardly be said that the issue was premature. Nor on its

face is the writ sweeping; it is finely tuned to the wrong perceived by the Court to be imminent and to the apparent elimination of any other judicial relief.

Section 207(b) of the Act was not stricken down prematurely nor more broadly than necessary. That section prescribed a series of judicial steps required to be completed by July 2, 1974. Those procedures were the subject of constitutional attack on many grounds. The effect of the decision on the 180th day, if the terms of the Act were allowed to stand, would have been either the irretrievable commitment of the estate to reorganization under the Act or dismissal of the Section 77 proceedings. The Act furnished no possibility of postponing that determination or of creating any new option but those prescribed by its terms. And, plainly, the requirement that the pending reorganization proceeding be dismissed upon a 180-day finding adverse to the Act was an *in terrorem* provision designed to make it excruciatingly difficult for the Reorganization Court to decide against the Act.

Faced with this situation the three-judge Court, barely a week before the deadline, enjoined only so much of Section 207(b) as prescribed dismissal upon a finding adverse to the Act. It can hardly be said that the injunction was premature. And, again, the Court excised from the Act by its writ only so much as was necessary to eliminate the unconstitutional imposition upon the Reorganization Court of a rule of decision novel to bankruptcy law, coercive in its effect and unconstitutionally non-uniform.

Both the United States and USRA save their most severe criticism for the first decretal paragraph of the order, which enjoins USRA from certifying a Final System Plan to the Special Court pursuant to Section 209(c) of the Act. Both Appellants claim that they can perceive no injury which this provision sets right. They brand it as unnecessary and broadly suggest that it is vaguely irrational (U.S. Br. at 55-57; USRA Br. at 73-74).



This provision of the injunction, like all the others, was fashioned in the light of the pervasive Congressional intent to oust federal courts from the jurisdiction to monitor the ongoing procedures of the Act as they affect the interests of the estate and its claimants. It was necessary to enjoin the certification of the Final System Plan because that certification, under the provisions of the Act, triggers a set of other statutory provisions which make it impossible for any court to restrain or modify even the most glaringly unconstitutional imposition in the name of the Final System Plan.

For example, Section 209(a) specifies as follows:

> "Notwithstanding any other provision of law, the final system plan which is adopted by the Association and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section. After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties."

The proviso allowing valuation review to the Special Court in turn leads one to Section 303 of the Act. As we have already pointed out, the Special Court has no discretion to prevent the consummation of conveyances called for by the Final System Plan. So the proviso in Section 209(a) cannot operate, under the terms of Section 303, to permit the Special Court to enjoin an unconstitutional transfer pursuant to the certified Final System Plan.

And to close the circle, Section 303(b)(2) ends with the specific provision: "Such conveyances [called for by the certified Final System Plan] shall not be restrained or enjoined by any Court."

Thus, once the Final System Plan is certified, *no* federal court has equity power to enjoin its unconstitutional application to the estate of the Penn Central, unde the terms of the Act as written. It is plain, moreover, that this is fully expressive of the Congressional intent. The prohibition against injunctions directed to the Final System Plan has been part and parcel of the Act sine it first appeared in the House as H.R. 9142, and the same language as appears in the Act was contained in the Snate version of this bill, S. 2767. The intent of these sections, as drafted, and as passed, was to preclude litigation over the constitutional rights of claimants against the etate in advance of the conveyance of rail assets to Conail. Writing with reference to the House version, the Committee on Interstate and Foreign Commerce, in repoting the bill out, made this explicit.

> "Section 302(f) provides that the conveyances of rail properties are to be free and clear of any liens and encumbrances, and that the conveyaces are not to be deferred because of any controversy over valuation. This provision is of central importance to the expeditious implementation of this Act. It is the intent of the Committee that therail properties designated in the Final System Pln be conveyed first, and that any and all litigatn concerning the amount or type of payment o consideration take place thereafter. The timely implementation of the Final System Plan cannc be obstructed by controversy over the payment fr the properties. The Committee is of the opinio that provisions of this title of the Act, and especially the provision for deficiency judgment and pyment of obligations of the Association provide in the preceding subsection, are more than aequate to guarantee that the creditors of the bakrupt railroad will receive all that they may Cnstitutionally claim. In view of these extraordinary protections, no litigation should be permitted to delay the Final System Plan."[83]



As has already been noted (*supra* at 76), a similar view was expressed in the report of the Senate Committee on Commerce accompanying S. 2767 to the floor, to the express effect that "the special court is not given any discretion in making the order requiring conveyance."[84]

Certification of the Final System Plan, therefore, would trigger a set of provisions, the effect of which would have been to exclude the Special Court, the Reorganization Court, and any other court from enjoining any unconstitutional features of the Final System Plan.

The District Court therefore enjoined certification. It was important that the Court take that step. In the first place, it obviates any future contention that the injunctive provision with regard to Section 304(f), insofar as that order makes room for future judicial determination that service reductions or terminations are constitutionally required, is itself subject to defeasance by certification of the Final System Plan. It was, in short, an appropriate writ to preserve the vitality and integrity of its other injunctive relief.

Furthermore, to the extent that the Court below (by a majority) held that it was premature to consider the constitutional challenges addressed to the ultimate conveyance provisions of the Act, enjoining the certification of the Final System Plan was indispensable to any future opportunity to examine them. If the certification had not been enjoined, the effect of the decision below would have

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[83] H.R. No. 93-620, 93d Cong., 1st Sess., at 54-55.

[84] S. Rep. No. 93-601, 93d Cong., 1st Sess., at 33. As the conference report on the Act as passed states, the conference bill followed the Senate amendment subject to technical and clarifying changes not affecting this point. H.R. Rep. No. 93-744, 93d Cong., 1st Sess., at 58.

been to put the ultimate conveyance beyond any constitutional challenge: until the point of certification, on the Court's analysis, it would be premature to consider such a challenge; but from and after the point of certification, the Act forbids any court to consider a constitutional challenge to the conveyances. The same event which would ripen the claim would defeat the subject matter jurisdiction of any court entitled to hear it. The injunction against certification, then, was necessary to prevent an absurd result.[85]

Far from being an extravagant abuse of equitable discretion, the relief granted below was fashioned to cope with an extraordinary set of statutory circumstances. Its terms were obviously developed with restraint, and it met only so much of the constitutional problems posed by the Act as threatened constitutional harm to the plaintiffs below and precluded subsequent equitable relief in any forum. The exercise of this astute discretion should not be disturbed by this Court.

## IV.

### The Order Entered Below may be Sustained on Other Grounds not Reached by the District Court.

The Court below was not, as Appellants would have it, excessively zealous; it was, if anything, cautious to a fault. It declined to rule on certain challenges posed below on the ground of prematurity, and it selected narrow grounds on which to sustain its declaration that the Act is unconstitu-

[85] It is open to doubt that the provisions of the Act which deny to federal courts the power to enjoin the conveyances are themselves unconstitutional. See, e.g., *Lockerty* v. *Phillips*, 319 U.S. 182. The Court below, therefore, could not, with any assurance, prevent the constitutional conundrum from developing by the expedient of striking down the prohibitory language of Sections 209(a) and 303(b)(2).



tional, rather than multiple, broader grounds which were argued to it.

While Appellees have not cross-appealed from the District Court's abstention from adjudicating certain of the matters before it, they do concur with the views expressed by the New Haven Trustee and by the Penn Central Trustees in their cross-appeal and appeal, respectively. More to the present point, however, Appellees here contend that the injunctive relief afforded them below was sustainable, not only upon the grounds assigned by the Court below, but upon other grounds not reached. This Court should not disturb the decision below since it can rest on wide and varied bases in addition to those already argued herein.

Specifically, Sections 207(b), 303 and 304(f), which were in certain particulars declared unconstitutional, and the unconstitutional effect of which was restrained by injunctive orders directed to Sections 207(b), 209 and 304(f), are unconstitutional and properly enjoined for the further reasons that: (a) they effect a taking of the property of Appellees without just compensation required by the Fifth Amendment; (b) they separately and cumulatively amend or supersede Section 77 of the Bankruptcy Act, and therefore constitute a law with respect to bankruptcies which is void because, by its very terms, it is not uniform throughout the United States; and (c) the provisions taken together deprive Appellees of their property without due process of law.

Appellees now turn briefly to these additional bases upon which the order of the Court below may be sustained.

### A. The Act Takes Appellees' Property for Public Use Without Just Compensation.

The Act operates to take Appellees' properties by a series of steps, each of which has mandatory consequences leading inexorably to the eventual conveyance and extinction of their right to enforce their liens against the ap-

propriate rail properties. See Sections 207(b), 209, 303. To preserve the physical integrity of the railroad for ultimate conveyance, and to ensure service in the interim, abandonments in the planning period are forbidden. Section 304(f). The declaratory judgments and injunctions contained in the order below with respect to these provisions are amply and alternatively justified in that they authorize an uncompensated taking of Appellees' property.

The end result of this legislated process is that Appellees' properties are taken from them, and whatever be its Congressional characterization, its legally significant elements are indistinguishable from those of a condemnation:

First, Appellees' property and their rights to enforce and realize upon their liens secured by the rail properties to be transferred are taken from them.

Second, the transfer to Conrail and the concomitant taking of Appellees' properties are effected by legislative and executive fiat for a declared public purpose.

Third, Appellees have absolutely no choice with respect to the transfer of their property. Thus, at no time in the process is Appellees' consent to the taking, or for that matter the consent of the Trustees of Penn Central, solicited or required. More to the point, there is no moment in the statutory sequence of events at which either the Trustees, creditors or the stockholder of Penn Central could, by reasonably withholding their consent, prevent the prescribed conveyance.

In short, the Act prescribes a series of steps which follow automatically one upon the other, at the end of which title to Penn Central's designated rail properties will have been conveyed and Appellees' liens on such property will have been extinguished, without their consent, all for a public purpose. That is condemnation. *Armstrong* v. *United States*, 364 U.S. 40, 48-49; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555.



Congress apparently sought to avoid that legal consequence by vesting ostensible choices in the Reorganization Court under Section 207(b). But the "choices" are no choices at all and the attempt fails as a matter of law.

Analysis of Section 207(b) shows the illusory character of the options which supposedly devolve on the Reorganization Court. First, a distinction: there is a radical difference between a court's finding of fact, on the one hand, and a court's choice of what to do about the fact found, on the other. Findings emanate from the evidence, choices from discretion. A court enjoys no choice to find a true fact false or a false fact true: the result is compelled by the evidence, objectively examined.

What Section 207(b) assigns to the Reorganization Court is the duty to make findings, not the opportunity to make choices. From these findings flow mandatory consequences about which the Reorganization Court has no discretion, no option, no choice, at all.

Assuming without conceding that choice in the Reorganization Court could substitute for choice in the owner, it is apparent that no such choice is vested in that Court by the Act. The supposed "choices" are illusory and the compulsory taking is as naked as if it had been spelled out, candidly, in forthright terms.

Congress was well aware of the exact nature of the tasks it asked the Reorganization Court to perform. On several occasions during the legislative process, Claude S. Brinegar, the Secretary of Transportation, warned Congress that its proposed transfer provisions—in the forms which on such occasions the provisions had assumed—should be amended in order to preclude a court's later finding them to effect a condemnation (see JA 214). Notwithstanding these admonitions, Congress passed and the President signed the Act in almost precisely the form Mr. Brinegar criticized. "All other options available to the railroad" are indeed "foreclosed by the statute," and Mr.

Brinegar's conclusion is correct: "what you have is, in legal effect, a condemnation." (JA 215)

For this condemnation, no just compensation is provided by the Act. It has long been settled that the Fifth Amendment requires that compensation for a taking be paid in legal tender of the United States. *Almota Farmers Elev. & Whse. Co.* v. *United States,* 409 U.S. 470; *United States* v. *Reynolds,* 397 U.S. 14; *United States* v. *Miller,* 317 U.S. 369; *Olson* v. *United States,* 292 U.S. 246; *Vanhorne's Lessee* v. *Dorrance,* 2 U.S. (2 Dall.) 304. The Act's requirement that Conrail pay for Penn Central's rail properties with Conrail securities (including USRA obligations) and other undefined benefits clearly renders the Act unconstitutional on its face under the doctrine enunciated in the cited cases. Congress not only failed to provide for payment in cash, moreover, but provided for payment principally in the unseasoned equity of a new, untested corporation, the yet unidentified operating assets of which will be those very assets now held by bankrupt railroads which cannot operate them profitably. The Act thus requires the estates to accept compensation which is wholly speculative as to value, a provision utterly at odds with both the principle underlying the requirement that compensation be paid in cash and, of course, violative of the requirement itself.[86]

**B. To the Extent the Act is a Bankruptcy Act, It is Void Because It is not Geographically Uniform.**

Appellants and *Amici Curiae* attempt to avoid the constitutional thrust of the eminent domain objection by arguing, on the basis of authority developed in railroad

[86] Moreover, since the liens of Appellees are extinguished *in toto* to the extent they attach to conveyed assets, they are compensable, *in toto,* in cash under the Fifth Amendment. *Armstrong* v. *United States,* 364 U.S. 40. Appellants' position that a deficiency judgment in cash will cure the "shortfall" in value in Conrail securities does not meet the constitutional test.



reorganization cases under the Bankruptcy Act, that creditors' remedies may be postponed, and securities exchanged, without the provision of just compensation in money or its perfect equivalent. However wrong the application of those principles may be in the context of this case, it is clear that they derive from the bankruptcy clause of the Constitution, Art. I, Section 8, Clause 4.

The Act contains provisions: (a) forbidding reorganization courts to halt interim operations and the losses thereby sustained (e.g., § 304(f)); (b) substituting new rules of decision for pending reorganization proceedings (§ 207(b)); and (c) providing for the transfer, free and clear of liens, of the rail assets of the railroads in reorganization, with a determination that the exchange is "fair and equitable" made after, rather than before, the exchange is completed. All of these provisions amend or supersede provisions of Section 77. The intent and effect of all of these provisions is to alter the course of existing reorganization proceedings in the defined region so that a different result will ensue from that which could be arrived at under Section 77. To do this, the Act plainly affects the contractual rights of creditors with respect to the debtor's estate in ways not now contemplated by Section 77.

No case has been cited by Appellants to justify the proposition that creditors' remedies may be altered under the commerce power; it appears to be recognized that such alteration is the very essence of the bankruptcy power. Therefore, to the extent that Congress intended a reorganization, rather than a condemnation, it must have intended to derive its power from the bankruptcy clause. And that clause is unequivocal that, in the exercise of the bankruptcy power, Congress must avoid explicit geographical non-uniformity. *Hanover Nat'l Bank* v. *Moyses,* 186 U.S. 181. It cannot be subject to serious controversy that the Act has effect only in the region which it defines, in accordance with its express terms. Unlike the *Head Money*

*Cases,* 112 U.S. 580, where the uniformity requirement was found to have been satisfied by an act which, though uniform in terms, happened to fit only one area of the country, this Act is not uniform in terms. The coincidental fact that, if it were drafted with appropriate geographic uniformity, it might apply only to the same region cannot save it if anything substantial is to be left to the uniformity requirement of the bankruptcy clause.

To endow the Congress with the authority to make geographically non-uniform laws with respect to bankruptcies, accompanied by the authority to alter creditors' remedies in industries allegedly affected with a public interest, would be to lay the groundwork for discriminatory legislation of a kind which the bankruptcy clause obviously intended to prevent.

Since the sections of the Act which were the subject of the injunctions below are all to the effect described above, whether considered separately or together, the order below is separately justifiable on this ground as well.

### C. The Processes of the Act Deprive Appellees and the Penn Central Estate of Due Process of Law.

The Reorganization Court has held that the Act does not provide a process fair and equitable to the Penn Central estate upon numerous grounds related to the likely impact of the Act upon the estate. No other determination could have been made—or can here be made—consistent with procedural due process.

A finding that the Rail Act can provide a fair and equitable process would of necessity rest either on sheer speculation about significant matters now unknown and unknowable or upon a judicial discard of Section 207(b) as a meaningful provision of the Act. The former result obtains if the Court were to suffer an impossible and unconstitutional burden of proof to be imposed upon Appellees by Section 207(b). The latter would result from acquiescence in Appellants' contention that the Court must defer to the estimate of success accorded the Act by its Congressional authors. Neither view comports with basic notions of due process.



In the first place, the Act contains no adequate standards which the Reorganization Court could apply in making any finding that the process would be fair and equitable; and secondly, whatever standards be presumed, it was literally impossible to make any factual record sufficient to sustain the burden as it is set out in the Act.

With respect to the absence of standards to be employed in rendering the 180-day finding, the language of Section 207(b), to the extent that it is understandable, suggests that the Reorganization Court was to apply the traditional "fair and equitable" standard of Section 77 to the sequence of procedural steps of the Act. But those concepts only have meaning as to specific transactions embodied in a specific proposed plan of reorganization and are used in Section 77 to describe attributes of a specific, identified proposal. The words are not used in Section 77 to describe a process, the future outcome of which is unknown and unknowable at the time the standard must be applied. They lose all content when used to measure the abstract process as outlined in the Act.

The parties in the 180-day hearings assumed that the determination called for by Section 207(b) was somehow to be a measure, by some undefined standard, of the likelihood of a fair and equitable process. Necessarily the measure of the fairness of the process must refer to the measure of the adequacy of the result and of the adequacy of the exchange provided for by the Act. See *New Haven Inclusion Cases,* 399 U.S. at 434.

Presumably, then, the burden placed upon Appellees would have been to demonstrate that the process is not, by some degree of probability, likely to afford a fair and equitable result to the Penn Central estate. However,

because of the time at which such evidence was required, the record upon which it could have rested was by necessity not existent. By the time of the 180-day hearing, neither the Final System Plan nor the preliminary system plan had been adopted; thus Appellees did not know (1) the identity of the Penn Central properties to be conveyed; (2) the value of the properties to be transferred; (3) the amount of Conrail's securities to be received in exchange for the properties; (4) the value of Conrail securities or any of the critical determinants of that value (such as assets, capital structure, traffic patterns, earnings prospects, fixed charges); (5) the existence, identity and value, if any, of the other putative "benefits"; or (6) the value and collectibility of any judgment which may be rendered against Conrail. Consequently, as stated by Judge Fullam in his concurrence below, there was no record available on which to render a determination that a process fair and equitable to the Penn Central estate would result. (JA 78-79)

Therefore, the only opportunity—the 180-day point—afforded to Appellees to avoid confiscation of their properties was itself fatally defective because Appellees were given no effective opportunity to be heard as to why their properties should be excluded from the Act's mandatory taking provisions. The Act offered no standards giving meaning to the 180-day finding and, to the extent Appellees or the Reorganization Court could have divined any standards, the resulting burden of proof forced upon Appellees was inherently impossible to satisfy. Appellees were thus required to engage in a syllogistic exercise in which the major premise was undefined and the minor premise was unknowable.

Differently put, a decision that the Act does provide a fair and equitable process would have been tantamount to a holding that Congress had in effect created an unconstitutional presumption. Pursuant to the terms of Section



207(b), and as noted by the Reorganization Court (JA 125), the failure to enter any findings results in Penn Central's subjection to the mandatory transfer provisions of the Act. Thus, if the Reorganization Court had found itself stymied, its failure to enter any findings would have been equivalent to a finding that the Act *does* provide a process which would be fair and equitable; a "no-finding" is *presumed* to be a finding that the process would be fair and equitable. Congress has thus created a presumption without rational connection between the ultimate result presumed (fairness and equitableness) and the basis therefor (an inability, based on factual ignorance, to enter the findings). By virtue of this provision, the less one knows about the outcome of the process, the more certainly it is presumed to be fair. That is an irrational presumption, and violative of due process. *Vlandis* v. *Kline*, 412 U.S. 441; *Leary* v. *United States*, 395 U.S. 6; *United States* v. *Romano*, 382 U.S. 136; *United States* v. *Gainey*, 380 U.S. 63; *Tot* v. *United States*, 319 U.S. 463. Of course, by making the presumption practically irrebuttable, the Act moves the irrational presumption to the border of conclusiveness.

Moreover, once committed to the terms of the Act, its processes are inexorable. As already argued, the Act shuts off all equitable recourse that Appellees might otherwise have had to protect themselves against the unconstitutional effect of the Act as applied to them. Simultaneously, the procedures of the Act most explicitly and inevitably would take the property of the estate and extinguish Appellees' liens, without any opportunity on their part to be heard or to obtain equitable relief against such mandatory conveyances. By denying Appellees the right to be heard and to obtain such relief, the Act in the most literal way deprives them of their property without due process of law.

The provisions of the Act enjoined below, if allowed to take effect in accordance with their terms, would have

had the consequences described above. While the Court below did not rest its declaratory judgment or its injunction upon the ground that the Act was violative of due process, its order can be sustained on that alternative ground.

## CONCLUSION

**The order of the District Court declaring Sections 303, 304(f) and 207(b) of the Regional Rail Reorganization Act of 1973 to be unconstitutional in the particulars therein specified and enjoining the operation, execution, or enforcement of Sections 209(c), 304(f) and 207(b) in the manner and to the extent therein specified, should be, in all respects, affirmed.**

Respectfully submitted,

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